No. 05-19-01236-CR

In the Court of Appeals
for the Fifth Court of Appeals District
Dallas, Texas

AMBER GUYGER,
APPELLANT,

v.

THE STATE OF TEXAS,
APPELLEE.

On Appeal from the 204th Judicial District Court
Dallas County, Texas
Hon. Tammy Kemp, Judge
In Cause No. F18-00737-Q

STATE'S RESPONSE BRIEF

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The State requests oral argument.

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To the Honorable Court of Appeals:

Appellant walked into an apartment that wasn't hers, shot a man who wasn't a threat, got defensive instructions she wasn't entitled to, and received a verdict she didn't want. Now she asks this Court to acquit her or find her guilty of a lesser offense. Because intentionally killing a man in his own apartment is murder, the State of Texas submits that Appellant's conviction is just fine, and this Court should affirm it.

STATEMENT OF THE CASE

Appellant was indicted for murder.[1] *See* Tex. Penal Code § 19.02(b)(1), (2). She pleaded not guilty.[2] A jury convicted her.[3] The jury rejected her sudden-passion claim and assessed punishment at ten years' confinement.[4] *See* Tex. Penal Code § 19.02(a), (c), (d). The trial court pronounced sentence accordingly.[5] This appeal followed.

[1] Clerk's Record volume (CR) 1:18 (original indictment); CR8:2331 (amended indictment); Reporter's Record volume (RR) 8:92.
[2] RR8:93.
[3] CR8:2553; RR15:8.
[4] CR8:2552; RR16:129.
[5] RR16:130.

Issues Presented

This Court must decide the State's cross-issue before it considers Appellant's two issues:

1. **Mistake-of-Fact Instruction.** Mistake of fact is a defense only if the mistake negates the culpable mental state. The culpable mental state for murder relates to the result. There was evidence that Appellant was mistaken about the circumstances surrounding her conduct, but not the result. Was Appellant entitled to the mistake-of-fact instruction that the trial court gave her?

Appellant's two issues are:

2. **Legal Sufficiency.** Appellant walked into Botham Jean's apartment and shot him in the chest. She claimed that she believed she was in her own apartment and that Botham was going to kill her. Is the evidence legally sufficient both to prove that Appellant committed murder and to support the jury's rejection of her defensive claims?

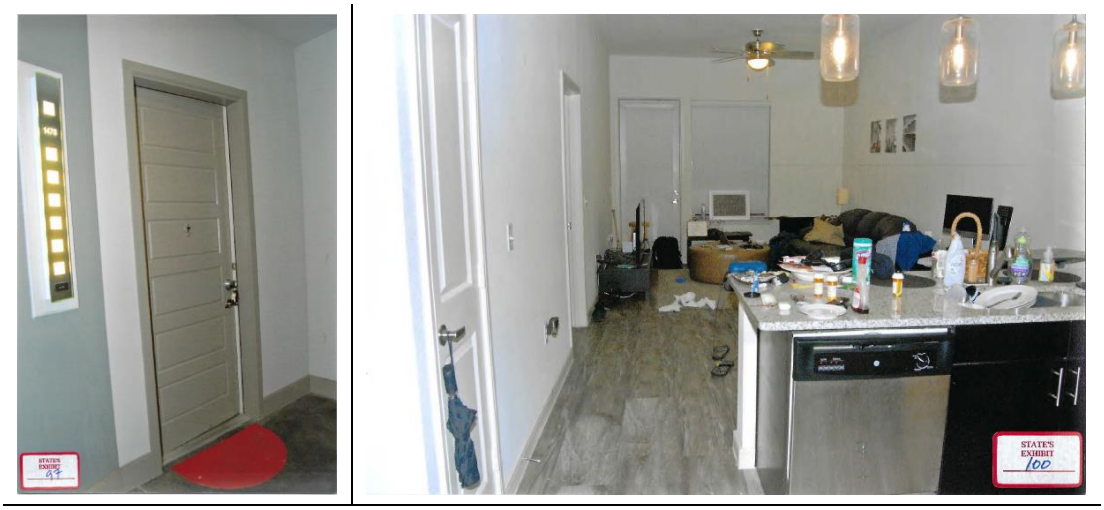
3. **Lesser Offense.** If the evidence is sufficient to convict Appellant, should she have been convicted of criminally negligent homicide instead of murder just because she was in the wrong apartment?

STATEMENT OF FACTS

Botham Jean was in his own apartment and had just sat down to eat a bowl of ice cream when Appellant, an off-duty Dallas Police Officer who lived right below him, opened the door and shot him. Appellant said that she shot Botham because she believed he was in her apartment and was going to kill her. The jury rejected that explanation.

Botham Jean

Botham Jean lived in apartment 1478 on the fourth floor of the Southside Flats apartment complex in Dallas, Texas.[6] He had a red doormat outside his apartment.[7]



State's Exhibits 97 & 100: Outside and inside Botham's apartment.

A native of St. Lucia, Botham had graduated from Harding University in Arkansas, and he worked as an analyst at Pricewater-

[6] RR9:191; SE 31.
[7] RR10:39–40, 137–38; RR10:231; RR11:44, 61,135; SE 95, 97, 228, 265–67.

houseCoopers in Dallas.[8] Botham had ADHD, so he smoked marijuana to help him focus.[9]

On September 6, 2018, Botham spoke to his sister, Alyssa Findley.[10] Botham, who had recently had a wisdom tooth removed and been placed on a liquid diet during his recovery, told Alyssa that he that he had just been cleared to eat ice cream.[11]

Early in the afternoon on September 6, the leasing office came by and told Botham and his neighbor across the hall, Joshua Brown, that there had been a noise complaint.[12] As a result of this, Botham and Brown met for the first time and had a conversation.[13]

The last hours of Botham's life are found in electronic key records. Residents at the Southside Flats have electronic key fobs that lock and unlock their apartment doors and also open the gate to the parking garage; the locks and the gate both record when the fobs are used.[14] The records showed that in the evening of September 6, Botham entered the parking garage at least twice, at 4:46 p.m. and then at 9:27 p.m., and he last used his key on his door at 9:34 p.m., about a half hour before Appellant killed him.[15]

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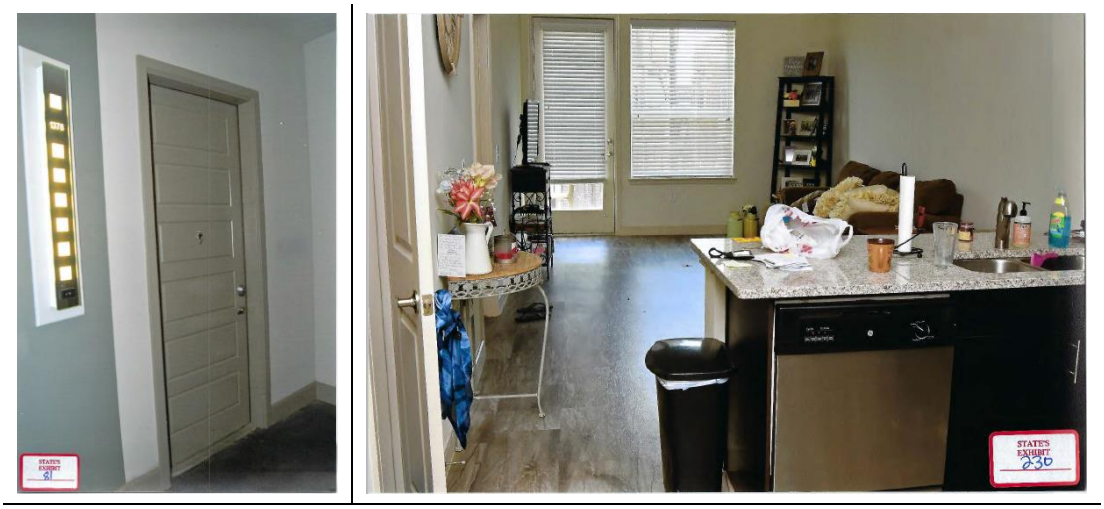
[8] RR8:140–43.
[9] RR8:146.
[10] RR8:150–51.
[11] RR8:150–51; RR9:307.
[12] RR9:225–26.
[13] RR9:226.
[14] RR9:210, 217–18, 286; SE 39–41.
[15] RR9:220, 289, 294; RR10:88; SE 39, 41, 42–45.

Amber Guyger

Appellant lived immediately below Botham in apartment 1378, which had the same floor plan but was decorated differently.[16] She had no decorations outside her apartment.[17]



State's Exhibits 81 & 230: Outside and inside Appellant's apartment.

A Dallas Police Officer, Appellant was assigned to the Crime Reduction Team (CRT), a unit of officers that dealt mainly with narcotics complaints and executing arrest warrants.[18]

On September 6, 2018, Appellant used her key on her apartment door at 7:23 a.m. and then went to work, undocking her body-worn camera at the police station about 25 minutes later.[19] Her CRT unit assisted the SWAT team in arresting a group of robbery suspects that day.[20] The unit "work[ed] the perimeter" while SWAT

[16] RR9:192–93, 215; RR11:45–50; SE 32, 34, 229–41.
[17] RR10:228; RR11:40; SE 79, 81.
[18] RR8:156–58.
[19] RR8:27; RR9:288–89; RR10:81–82; SE 40.
[20] RR8:163.

made the arrests.[21] The unit then took the arrested suspects to police headquarters and "sat" on them for several hours.[22]

During this time, Appellant appeared "alert and aware" to her partner, Martin Rivera.[23] She had no "obvious deficiencies," she was able to "see with her eyes," she wasn't under any "undue stress," and she looked normal.[24] She didn't complain about being ill or tired, or about having fatigue or memory loss.[25]

After Rivera left that evening to go to a "personal event" while the rest of the unit stayed to work overtime, Appellant began texting with him; the two exchanged sexual banter and discussed "getting together" that evening.[26] Appellant and Rivera had been in a sexual relationship from "sometime in 2017" through February 2018, and after that they had continued texting "provocative" photos of themselves to each other.[27]

Around 8:00 p.m., Appellant texted Rivera that she was at the jail with the prisoners; ten minutes later she texted that she was "getting s[l]eepy" and was glad she "took off" the next day.[28] Just

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[21] RR8:164, 211.
[22] RR8:215–16.
[23] RR8:206, 208.
[24] RR8:208.
[25] RR8:208–09.
[26] RR8:207, 218–19, 221–22; SE 307.
[27] RR8:220–22; RR12:40–41. The photographs are not in the record because Appellant deleted all of her messages with Rivera. RR8:188, 236; RR12:99; SE 307. The State was able to recover only the text. RR8:188; RR10:85–86; SE 307.
[28] RR8:228–30; SE 307.

before 9:30, Appellant docked her body-worn camera as her shift ended.[29] About the same time, she sent Rivera a photo with the message "Wanna touch."[30] Four minutes later, she texted Rivera that she was "barely walking out."[31]

At 9:38 p.m., Appellant called Rivera.[32] They talked for nearly 17 minutes while Appellant drove to the apartment complex from the southeast substation where she was assigned.[33] At 9:46 p.m., while she was still on the phone with Rivera, Appellant entered the parking garage at the Southside Flats.[34]

But Appellant didn't drive straight to her parking spot: at some point after entering the garage, she stopped her truck and continued talking to Rivera until 9:55 p.m., when the call ended.[35] Another resident, Ron Jones, had entered the garage seven minutes after Appellant, at 9:53 p.m., but he made it to the fourth floor and parked before she did.[36] After Jones parked, he saw Appellant's truck "going fast around the corner" to the fourth floor, and he watched Appellant back into a parking space across from the hallway

[29] RR9:27; RR10:87; SE 24.
[30] RR8:231; SE 307.
[31] RR8:231; SE 307.
[32] RR8:231; SE 307.
[33] RR8:231–32; RR10:89; SE 307.
[34] RR9:294–96; RR10:89; SE 46–49.
[35] RR8:231; RR9:296; SE 307.
[36] RR9:246–47, 249, 251; RR10:75, 89; SE 258–60.

entrance.[37] Then he saw Appellant, in uniform and carrying a bag on her left arm, enter the fourth-floor hallway.[38]

The Gunshots

After Jones got to his apartment, he "heard gunshots."[39] A couple of minutes later, he heard a female voice repeating "there was someone in my apartment."[40]

Joshua Brown was walking down the hallway from the garage when he heard voices that sounded like "two people meeting each other on a surprise," and then he immediately heard two "quick" gunshots.[41] When he got to his apartment, he didn't see anyone in the hallway between his and Botham's apartments.[42] After a couple of minutes, he looked out and saw Appellant in the hallway; she was on the phone, "cryin[g], explaining what happened, what she thought happened, sayin[g] she came into the wrong apartment."[43]

Botham's next-door neighbor, Alyssa Kinsey, was sitting on her couch and FaceTiming with her boyfriend when she heard the shots, which sounded like a "metallic sound" in "two parts."[44] After about

[37] RR9:254, 260.
[38] RR9:255–57.
[39] RR9:257.
[40] RR9:258.
[41] RR9:228–29, 232.
[42] RR9:234–35.
[43] RR9:236.
[44] RR10:129, 131, 133.

five seconds, she heard a "commotion like a man's voice and a woman's voice…like, yelling, and it sounded like running or slamming."[45] About ten seconds after that, she heard "a female calling 911."[46]

Other residents heard the gunshots as well.[47] Sound carries from the apartments at Southside Flats, and Joshua Brown had often heard Botham singing from across the hall.[48] But none of the residents heard Appellant or anyone else give any loud commands before the gunshots.[49]

The 911 Call

At 9:59 p.m., Appellant called 911.[50] She told the call taker, "I'm an off-duty officer. I thought I was in my apartment, and I shot a guy, thinking that he was—thinking it was my apartment."[51] She said that she was "inside the apartment with him."[52] She said twenty times that she thought it was her apartment.[53] She also said, "I'm gonna lose my job," and asked for a supervisor.[54] While Appellant

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[45] RR10:133.
[46] RR10:133.
[47] RR9:270–71, 273; RR10:95, 97–98, 105, 107.
[48] RR9:239.
[49] RR9:233, 259, 273; RR10:102, 111.
[50] RR9:16–18; RR10:90; SE 4.
[51] SE 4.
[52] SE 4.
[53] RR12:108; SE 4.
[54] SE 4.

was on the phone with 911, she texted Rivera twice, saying "I need you…hurr[y]…" and "I fucked up."[55] The 911 call ended when the first responding officers got to Botham's apartment.[56]

The Responding Officers

Police response was swift. The first officers got to the complex within two minutes.[57] At 10:04 p.m., Officers Michael Lee and Keenan Blair made it to Botham's apartment.[58] They were able to find the right apartment by looking at the numbers, which are on illuminated signs next to the doors.[59] Not knowing what to expect, they approached with their guns drawn.[60] When Blair saw Appellant in the hallway, though, he lowered his gun in order figure out what was going on.[61]

When Lee and Blair entered the Apartment, Botham was still alive but unresponsive.[62] He was laying on his back in front of his couch.[63] He had a gunshot wound on his chest.[64] He was wearing shorts that had no pockets.[65]

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[55] RR10:90; SE 307.
[56] RR9:19; SE 4.
[57] RR9:19.
[58] RR9:36–37.
[59] RR9:51; RR11:39; SE 81, 96, 97, 188.
[60] RR9:52; SE 6.
[61] RR9:42, 52, 68; RR12:210; SE 6.
[62] RR9:42; RR11:24.
[63] SE 6, 8, 21.
[64] RR9:59, 180.
[65] RR12:50.

The responding officers started first aid and didn't stop until paramedics arrived.[66] The paramedics took Botham to Baylor Medical Center, where he died, having never regained consciousness.[67]

Sergeant Breanna Valentine made Appellant leave the apartment and go into the hall, where Appellant walked around using her phone.[68] After a while, Valentine brought Appellant downstairs and put her in a squad car.[69] But Valentine allowed Appellant to get out of the car, talk to friends, and hug them.[70]

The responding officers noticed that Appellant's keys were in the door to Botham's apartment.[71] There was no sign of forced entry on the door.[72] There were no weapons in the apartment.[73] The apartment smelled like marijuana.[74] A large TV and laptop provided ambient light.[75] There were light switches within easy reach of the door.[76] There was a bowl of still-frozen ice cream on the ottoman in front of his couch.[77]

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[66] RR9:43; RR11:22; SE 6, 21.
[67] RR9:175–80.
[68] RR9:97, 102–03, 105; RR11:22; SE 11–14, 21.
[69] RR9:RR9:108, 111; SE 10.
[70] RR9:112; SE 10.
[71] RR9:107, 155–56; RR10:213; SE 97–98.
[72] RR9:108, 160; RR10:214.
[73] RR10:256.
[74] RR9:58.
[75] RR9:54–55; RR10:215.
[76] RR9:87, 160–61, 307–08; RR10:248; SE 29–30.
[77] RR9:49, 147–48; SE 309.

The Investigation

Dallas Police Detectives handled the investigation at first.[78] They treated it as an "officer-involved shooting."[79] They saw no evidentiary value in Botham's red doormat and didn't have it seized.[80] They took blood from Appellant at 3:00 a.m.; she had no alcohol or drugs in her system at that time.[81]

The detectives collected Appellant's uniform and obtained her time cards from the two weeks leading up to the shooting.[82] They learned that Appellant had taken several days off in late August, and that she had worked some overtime in the days leading up to September 6.[83]

The detectives tested the electronic lock on Botham's apartment door.[84] When Botham's key was inserted, the lock made an audible sound, and a green light came on.[85] When Appellant's key was inserted, the lock didn't make a sound, a red light began blinking, and the key wouldn't turn.[86] This is exactly how the locks in the complex are designed to work.[87]

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[78] RR9:149–50. 153–54.
[79] RR9:154.
[80] RR11:16–17, 51–53.
[81] RR9:151; SE 16.
[82] RR9:151, 162–67; SE 18–19.
[83] RR9:162–67; SE 18–19.
[84] RR9:158; SE 17.
[85] RR9:158–59; SE 17.
[86] RR9:158–59; SE 17.
[87] RR9:210.

On September 7, the Dallas Police Department handed the investigation off to the Texas Rangers, who reviewed all the evidence that the detectives had collected.[88] When Ranger David Armstrong, the lead investigator, first went to the scene on September 8, Botham's apartment still smelled like marijuana.[89]

Armstrong investigated the lock on Botham's door.[90] The handle itself doesn't lock.[91] Instead, there is a separate deadbolt that is activated by either the electronic key from the outside or a lever from the inside, and there is an additional deadbolt that can only be activated from inside the apartment.[92] If neither deadbolt is engaged, anyone can open the door by turning the handle.[93] Botham's door also had a defect—a bent strike plate on the door frame—that could keep the door from closing all the way.[94]

Armstrong found the layout of the apartment complex to be "confusing."[95] Because the parking garage had "no clear obvious visual signs" to distinguish each level, Armstrong parked on the wrong level once during the investigation.[96] He also thought it was

[88] RR10:21–23; RR11:96.
[89] RR9:284, 301; RR10:22–23; RR11:65.
[90] RR9:290; SE 98.
[91] RR9:285.
[92] RR9:285.
[93] RR9:285.
[94] RR10:43–47; SE 39–43.
[95] RR10:29.
[96] RR10:30, 31.

"significant" that the third and fourth floors were similar in appearance and layout, so he canvassed the apartment complex to see if any other residents had previously parked on the wrong floor or gone to the wrong apartment.[97] Twenty-three percent of third- and fourth-floor residents had gone to the wrong door at some point while living at the Southside Flats.[98] But none of them ever shot anyone.[99] Instead, they realized they were at the wrong door when they saw the blinking red light and then looked up at the illuminated apartment number next to the door.[100]

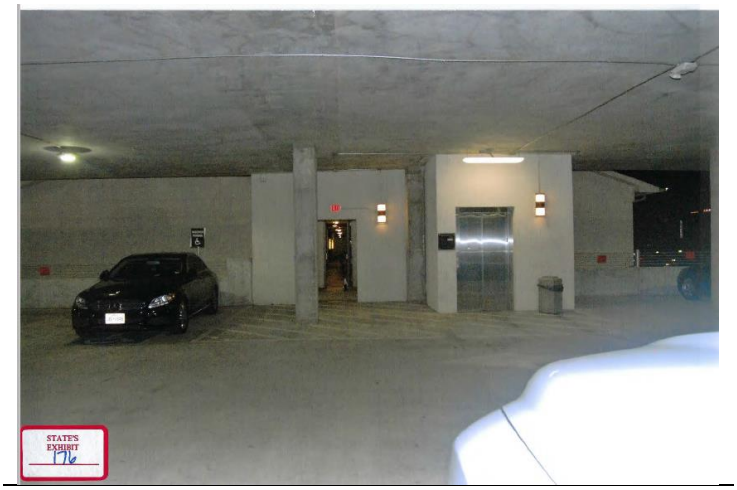
When Whitney Hughes, one of the residents who heard the gunshots, had gone to the third floor by mistake, it "felt different" due to the doormats and a large plant in the hall.[101]

State's Exhibits 76 & 91: The third and fourth floor hallways.

[97] RR9:292; RR10:41.
[98] RR9:292–93; RR10:41–42.
[99] RR9:293.
[100] RR9:293; RR10:38, 123, 128; SE 80–81, 96–97, 188.
[101] RR10:116, 121, 127.

Hughes ultimately realized her mistake when she put her key in the door: The door lock blinked red, and she looked at the apartment number.[102]

When Alyssa Kinsey, Botham's neighbor, parked on the third floor by mistake, she didn't even get inside the building: She realized she was on the wrong floor because the roofline was different.[103]



State's Exhibit 176: The fourth-floor roofline visible from the fourth floor of the garage.

The Autopsy and Forensic Evidence

Dr. Chester Gwin performed the autopsy on Botham.[104] Dr. Gwin determined that Botham died of a single gunshot wound to the chest.[105] The bullet had entered the left side of Botham's chest, just above the nipple; it traveled through his chest, and it hit—but was

[102] RR10:123, 128.
[103] RR10:138–39; RR11:41.
[104] RR10:165, 170; SE 268.
[105] RR10:189, 190–91.

not deflected by—a rib, after which it went through Botham's left lung, his heart, his diaphragm, his stomach, and his intestine before coming to rest in the psoas muscle in his left abdomen near his spine.[106]

These injuries would have quickly caused significant blood loss and pain.[107] The bullet's trajectory through Botham's body was very steep; either the shooter would have been standing right over Botham shooting down, or Botham would have been laying down or bent forward—as if either getting up from the couch or ducking—when he was shot.[108]

State's Exhibit 316: The trajectory of the bullet, as demonstrated by Dr. Gwin and lead prosecutor Jason Hermus.

[106] RR10:178–83, 186.
[107] RR10180–81, 192–93.
[108] RR10:183–85, 203; SE 316.

Appellant's handgun had been seized early in the investigation.[109] It was missing two rounds.[110] There were two cartridge cases on the floor of Botham's apartment, and there was a bullet hole in the back wall.[111] Subsequent toolmark analysis confirmed that both cartridge cases were fired from Appellant's gun.[112] Flight-path analysis of the bullet hole in the wall indicated that the shot had been fired from the doorway.[113] There was gunshot residue on the doorframe.[114] The bullet recovered from Botham's body was the same type of bullet as those in Appellant's gun.[115]

The Rangers, using three different tests, found no evidence of blood on Appellant's uniform.[116] Appellant had been carrying latex gloves on September 6; none of them were used.[117]

Appellant's Evidence

Appellant testified in her own behalf.[118] She said that after moving into the Southside Flats, she learned that there had been "a lot of robberies and a lot of break-ins in that area."[119] She said that

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[109] RR10:219–20.
[110] RR10:223.
[111] RR10:26–27, 65–66, 237–38, 248–49; RR11:14–15, 73; SE 106, 140, 147.
[112] RR10:187–88, 219–20; RR11:115–18.
[113] RR11:74–79, 81–82, 89–94; SE 279, 281.
[114] RR10:152.
[115] RR11:121–22.
[116] RR11:95–98.
[117] RR11:102–03.
[118] RR12:22.
[119] RR12:45.

"homeless people" would "jump the fence" into the complex and "pass[] out…in the pool area."[120]

On September 6, she said, she made sure her door was locked when she left that morning.[121] After work, she said, she drove home while on the phone with Rivera.[122] She denied stopping in the garage and said that she drove straight up and parked on what she thought was the third floor.[123] She said she walked inside, carrying her equipment, and didn't look at the roofline.[124] She said she was "just ready to go home" as she walked down the hallway and got to what she thought was her apartment.[125]

Appellant said that when she put the key in the door and turned it, she saw that it was "cracked open," and the key "forced the door open."[126] She said she heard "loud shuffling," like "someone walking" inside."[127] She said the lights were off inside, and she was "scared."[128]

When the door opened, Appellant said, she saw a "silhouette figure standing in the back of the apartment by the window."[129] She

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[120] RR12:45.
[121] RR12:54.
[122] RR12:64–65.
[123] RR12:65–66.
[124] RR12:70–71.
[125] RR12:72–73.
[126] RR12:80–81, 82.
[127] RR12:81.
[128] RR12:84.
[129] RR12:85.

said she drew her gun and "yelled…'Let me see your hands. Let me see your hands,'" but "the figure" was "moving around," and she "couldn't see his hands."[130] Then, she said, "He started coming towards me…at a fast-paced walk."[131] She said that she thought "he was coming at me. 'Cause I couldn't see his hands, he was gonna kill me."[132] She said that he was "yelling, 'Hey. Hey. Hey,' in an aggressive voice."[133]

Appellant shot Botham, and he fell down.[134] She said she shot because, "I was scared he was gonna kill me."[135] After shooting him, she said, she started looking around and realized she wasn't in her apartment.[136] She claimed that she did "some compressions" and "a sternum rub" while she was on the phone with 911.[137]

On cross-examination, Appellant admitted that she had concluded there was a threat inside the apartment before she opened the door, and that she could have both taken a position of cover and concealment and called for backup.[138] Instead she went in, pulled her gun, leveled it, and shot Botham.[139] She said that she is trained to

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[130] RR12:85, 88, 161.
[131] RR12:86, 88.
[132] RR12:86.
[133] RR12:86.
[134] RR12:89.
[135] RR12:89, 161.
[136] RR12:89–90.
[137] RR12:91, 92–93.
[138] RR12:138–42.
[139] RR12:133.

shoot twice in order to "maximiz[e] the lethality."[140] She admitted that she "intended to kill" Botham when she shot him.[141]

Appellant couldn't explain how she ended up behind Ron Jones in the garage if she didn't pull over.[142] She had no explanation for the conflict between her story and the location of the bullet hole in the wall or the angle of Botham's gunshot wound.[143] She couldn't explain why no one heard her give any loud commands.[144]

Appellant presented additional evidence that doors in the complex had problems closing.[145] She also presented testimony from several residents of the Southside Flats who described people going to the wrong apartment.[146] Nobody ever got shot.[147]

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[140] RR12:118.
[141] RR12:124.
[142] RR12:134–36.
[143] RR12:121–22.
[144] RR12:126–27.
[145] RR12:166–71.
[146] RR12:172–87; 189–98, 201–03.
[147] RR12:188, 199.

Summary of the Argument

State's Cross-Issue on Jury-Charge Error

Defensive issues like mistake of fact are available only if raised by the evidence. There was no evidence in this case that Appellant held a mistaken belief that negated the culpable mental state for murder. Murder is a result-oriented offense, but the evidence only raised an issue whether Appellant was mistaken about the circumstances. The trial court should not have included mistake of fact in the jury charge. Because it's not part of the hypothetically correct jury charge, this Court should not consider it as an available defensive issue when reviewing the sufficiency of the evidence.

Response to Appellant's Legal-Sufficiency Issue

Viewed in the light most favorable to the verdict, the evidence would allow a rational jury to find beyond a reasonable doubt all the elements of the offense: Appellant intentionally caused Botham's death.

The jury could rationally find against Appellant on the mistake-of-fact defense because there was no evidence that even raised the issue. Moreover, mistake of fact isn't an element of self-defense, and it can't be shoe-horned into a self-defense claim. English law doesn't change this. Mistake of fact in England is completely different from mistake of fact in Texas.

The jury could also rationally reject Appellant's self-defense claim. To do so, the jury had to 1) find beyond a reasonable doubt that there were no facts giving rise to a presumption of reasonable belief, and 2) find that Appellant did not reasonably believe that deadly force was immediately necessary. The jury could do both simply by disbelieving Appellant. The jury could also find against Appellant on the presumption because there was no rational, logical, or supporting ground to support any of the facts necessary to give rise to it. And finally, the jury could find that Appellant did not reasonably believe that deadly force was immediately necessary because it could rationally conclude that an ordinary and prudent person in Appellant's circumstances would not have believed it.

Response to Appellant's Lesser-Offense Issue

There is no reason to modify Appellant's conviction to criminally negligent homicide. Appellant intended to cause Botham's death. That's murder. Appellant's result-based argument focuses on the wrong result—shooting instead of death. Her circumstances-based argument focuses on the wrong mental state—about where she was instead of her intent to kill. And her imperfect self-defense argument focuses on the wrong law—other states instead of Texas.

Argument

This case is about what it means to commit murder. Is it murder when, intending to kill, you shoot an unarmed man in the chest while he's sitting on his own couch eating ice cream? Or—as Appellant argues—is it impossible to commit murder, even if you intend to kill, so long as you mistakenly believe you are in your own apartment?

The hypothetically correct jury charge answers this question. Appellant has raised a legal-sufficiency issue, and the legal-sufficiency analysis compares the evidence to the hypothetically correct jury charge. To resolve Appellant's sufficiency claim, this Court must first determine the hypothetically correct jury charge, and so this Court must first resolve the State's cross-issue.

Under Texas law, the mistake-of-fact defense was unavailable to Appellant, and it should not have been included in the charge. Once that is settled, the case is straightforward. Appellant didn't reasonably believe that Botham was a threat. She intended to kill Botham, and she shot him in the chest while he was sitting on his own couch eating ice cream. She committed unjustified murder.

State's Cross-Issue on Jury-Charge Error

1. The trial court erred in giving a mistake-of-fact instruction in the jury charge because the evidence didn't raise the issue.

The trial court instructed the jury on mistake of fact in the jury charge.[148] Mistake of fact is one of the defensive issues that Appellant argues in her legal-sufficiency issue.[149] Before this Court can decide that issue, this Court must consider whether the mistake-of-fact defense was even available to Appellant. Because the evidence didn't raise the issue of mistake of fact, Appellant wasn't entitled to a mistake-of-fact instruction, and the trial court erred in giving one.

1.1. This Court has jurisdiction to consider this cross-issue.

Even though Appellant hasn't raised any jury-charge issues in her appeal, this Court has jurisdiction to consider this cross-issue. The State is entitled to appeal a ruling on a question of law if the defendant is convicted in the case and appeals the judgment. Tex. Code Crim. Proc. art. 44.01(c).

The State does not have to file its own notice of appeal to raise an issue under this provision. *Pfeiffer v. State*, 363 S.W.3d 594, 604 (Tex. Crim. App. 2012). Instead, if the defendant appeals and the State "is likely to benefit from the resolution…in its favor" of a cross-

[148] CR8:2565–67; RR14:35, 50–51.
[149] Appellant's Br. at 80–105.

point on a matter of law, even if the appellant would otherwise lose the appeal, then the issue is "functionally in dispute" and within the jurisdiction of the appellate court. *Id.* at 601.

Whether a defensive issue is raised by the evidence is a question of law. *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007). Appellant has appealed her conviction and challenged the legal sufficiency of the evidence. Because sufficiency is reviewed in light of the hypothetically correct jury charge, the State will benefit from this Court's decision that the jury charge should not have contained a mistake-of-fact instruction, especially since Appellant relies on this defense in her argument. The issue is therefore "functionally in dispute," and this Court has jurisdiction to consider it. *Pfeiffer*, 363 S.W.3d at 601; *see also Rubio v. State*, 596 S.W.3d 410, 418–22 (Tex. App.—Dallas 2020, pet. granted) (considering and sustaining State's cross-issue in order to determine what arguments and evidence to consider when reviewing the appellant's issues).

1.2. The State preserved the issue for appeal.

Not only does this Court have jurisdiction, the State preserved this issue for appeal. To preserve an issue for appeal, a party must make a "timely…objection…that state[s] the grounds for the ruling …sought…with sufficient specificity to make the trial court aware of

the complaint," and the trial court must "rule[] on the…objection." Tex. R. App. P. 33.1(a)(1), (2). The party must "let the trial judge know what he wants, why he thinks he is entitled to it, and…do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it." *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009).

The State did that. The State told the court exactly what it wanted—it specifically objected to the instruction.[150] The State told the court why it was entitled to have the instruction removed from the court's proposed charge.[151] And the State did so when the court had time to do something about it—during the charge conference.[152] But the trial court overruled the State's objection and gave the erroneous instruction anyway.[153] The State, through its written and oral objections, has preserved these issues for appeal.

1.3. Defensive issues must be raised by the evidence, and mistake of fact is raised in a murder case only if there is evidence of a mistake that negates the defendant's intent to kill.

A defendant has a right to an instruction on a defensive issue only if it is raised by the evidence. *Shaw*, 243 S.W.3d at 657–58;

[150] CR8:2491–96 (written objection); RR14:27–35 (oral objection).
[151] CR8:2491–96; RR14:27–35.
[152] RR14:27–35.
[153] CR8:2565–67; RR14:35, 50–51.

Hamel v. State, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). "Mistake of fact" is a defensive issue under the penal code:

> It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.

Tex. Penal Code § 8.02(a). "Kind of culpability" means the culpable mental state for the offense. *Celis v. State*, 416 S.W.3d 419, 430 (Tex. Crim. App. 2013).

Appellant was charged with murder.[154] Murder is a "result of the conduct" offense, which means the culpable mental state relates to the result of the conduct—causing death or serious bodily injury. *See Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012). Because the mistake-of-fact defense applies only when the mistake negates the element of intent, a murder defendant is entitled to a mistake-of-fact instruction on only if there is some evidence that the defendant held a mistaken belief that negated her intent to cause death or serious bodily injury to an individual.

For example, a murder defendant is entitled to a mistake-of-fact instruction if he shot into an occupied car while believing it to be empty. *See Granger v. State*, 3 S.W.3d 36, 41 (Tex. Crim. App. 1999). That's because a defendant cannot "intentionally or knowingly

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[154] CR8:2331.

cause[] the death of the victim, or intend[] to cause serious bodily injury to the victim if [he] did not know that the victim was in the car." *Id.*

Similarly, a capital-murder defendant is entitled to a mistake-of-fact instruction if he believed that spankings he gave a child would cause only bodily injury rather than serious bodily or death. *Louis v. State*, 393 S.W.3d 246, 253–54 (Tex. Crim. App. 2012). That's because a defendant cannot intend to cause death or serious bodily injury to a child, or be liable for such injuries under a theory of transferred intent, if he reasonably but mistakenly believed that he was inflicting only bodily injury. *Id.*

Conversely, a capital-murder defendant is not entitled to a mistake-of-fact instruction if he shot at police officers while believing that they were not acting in the lawful discharge of their official duties. *See Mays v. State*, 318 S.W.3d 368, 383–84 (Tex. Crim. App. 2010). That's because the defendant's knowledge that a peace officer is "acting in the lawful discharge of an official duty" is not part of the culpable mental state required for capital murder. *Id.*

Likewise, a false-lawyer defendant is not entitled to a mistake-of-fact instruction if he held himself out as a lawyer in Texas while believing that he was licensed and in good standing in Mexico. *Celis*, 416 S.W.3d at 432. That's because a defendant's licensing or good

standing is not part of the culpable mental state required by the false-lawyer statute. *Id.*

1.4. There was no evidence that Appellant held a mistaken belief that negated her intent to kill Botham, so the court shouldn't have given a mistake-of-fact instruction.

Appellant's only alleged mistaken belief was that she was in her own apartment. That is not part of the culpable mental state required for murder. It is a circumstance that doesn't affect whether she intended to cause death or serious bodily injury by shooting Botham. A defendant who intends to kill or to cause serious bodily injury has the culpable mental state required for murder, no matter what the circumstances are or what she believes them to be. *See Gilbert v. State*, 196 S.W.3d 163, 166 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (defendant's recklessly creating circumstances in which complainant was shot does not raise the issue of manslaughter rather than murder); *Huizar v. State*, 720 S.W.2d 651, 654 (Tex. App.—San Antonio 1986, pet. ref'd) (defendant's mistaken belief about the circumstances did not negate the culpable mental state for murder).

Appellant never disputed that she intended to cause Botham's death when she shot him. In fact, she admitted at trial that she intended to kill Botham, and she makes the same concession in this

appeal.[155] There is no evidence in the record that suggests otherwise. For example, Appellant never said that she believed:

- that she was firing into an empty apartment,
  - which could have negated her intent to kill, *see Granger*, 3 S.W.3d at 41;
- that Botham was anything other than a living human being,
  - which could have been evidence of an intent to kill something other than an individual, *cf*. *Celis*, 416 S.W.3d at 448 n.42 (Cochran, J., concurring);
- that she was firing her taser or pepper spray,[156]
  - which could have been evidence of an intent to cause bodily injury rather than death, *see Louis*, 393 S.W.3d at 253–54; or
- that her gun was unloaded,
  - which, if reasonable, could have been evidence of an intent to threaten rather than an intent to kill, *see Davis v. State*, 692 S.W.3d 185, 189 (Tex. App.—Houston [1st Dist.] 1985, no pet) (noting that appellant was entitled to, and got, mistake-of-fact instruction when he testified that he believed gun was unloaded when he pulled the trigger).

Those are the types of mistakes that would negate Appellant's intent, but the record contains no evidence of any of them. The evidence did not raise the mistake-of-fact defense, so Appellant was

[155] RR12:124, 149; Appellant's Br. at 79, 80.
[156] Both of which were on her utility belt. RR10:217–18; RR11:99–100.

not entitled to a mistake-of-fact instruction in the jury charge. *Celis*, 416 S.W.3d at 432; *Mays*, 318 S.W.3d at 383–84; *Shaw*, 243 S.W.3d at 657–58. The court erred in giving one, and it is not part of the hypothetically correct jury charge.

1.5. The instruction that the court gave misstated the law and authorized Appellant to commit unjustified murder.

Even if Appellant was somehow entitled to an instruction on mistake of fact, she wasn't entitled to the instruction the court gave. After the jury found 1) that Appellant committed murder, and 2) that the murder wasn't justified,[157] it would have reached this instruction:

> If you have found that the State has proved the offense beyond a reasonable doubt, you must next decide whether the State has proved the defendant did not make a mistake of fact constituting a defense.
>
> To decide the issue of mistake of fact, you must determine whether the State has proved, beyond a reasonable doubt one of the following:
>
> 1. *The defendant did not believe that she was entering her own apartment* or did not believe that the deceased was an intruder in her apartment; or
>
> 2. *The defendant's belief that she was entering her own apartment* or her belief that the deceased was an intruder in her apartment *was not reasonable*.

[157] CR8:2561–65.

> You must all agree that the State has proved, beyond a reasonable doubt, either 1 or 2 listed above. You need not agree on which of these elements the State has proved.
>
> *If you find that the State has failed to prove, beyond a reasonable, doubt, either element 1 or element 2 listed above, you must find the defendant "not guilty."*
>
> *If* you unanimously agree that the State has proved, beyond a reasonable doubt, each of the elements of murder or manslaughter and *you unanimously agree that the State has proved beyond a reasonable doubt, either element 1, that the defendant did not believe that she was entering her own apartment* or did not believe that the deceased was an intruder in her apartment, *or element 2, that the defendant's belief that she was entering her own apartment* or that her belief that the deceased was an intruder in her apartment *was not reasonable, then you shall find the defendant guilty* as alleged or included in the indictment.[158]

This instruction told the jury that if it found beyond a reasonable doubt that Appellant committed murder, but also found that she reasonably believed she was in her own apartment, then it must acquit her.

And it went even further than that. By following the self-defense instruction, this instruction told the jury that even if it found *both* that Appellant committed murder *and* that Appellant didn't

[158] CR8:2565–67 (emphasis added).

reasonably believe that deadly force was immediately necessary, it *still had to acquit her* if she reasonably believed that she was in her own apartment.

Read it again: the trial court told the jury that a person can kill another human being without justification *if she reasonably believes she is in her own apartment*. That isn't mistake of fact. That's open season. The trial court should never have given this instruction to the jury.

This Court should sustain the State's first cross-issue and hold that the court erred in giving a mistake-of-fact instruction. Then this Court should evaluate the sufficiency of the evidence in Appellant's first issue with a hypothetically correct jury charge that does not include a mistake-of-fact defense.

Response to Appellant's Legal-Sufficiency Issue

2. The evidence is legally sufficient to support Appellant's murder conviction.

In her first issue, Appellant argues that the evidence is legally insufficient to support her conviction.[159] Her argument is without merit for three reasons: 1) the jury could find beyond a reasonable doubt that she intentionally caused Botham's death, 2) she presented no evidence to support a mistake-of-fact defense, and 3) the jury could rationally find that she did not reasonably believe that deadly force was immediately necessary.

2.1. The *Jackson* standard applies to the elements of the offense and also to defensive issues.

In a legal-sufficiency review, the reviewing court views all of the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the crime, as defined by the hypothetically correct jury charge, beyond a reasonable doubt. *Zuniga v. State*, 551 S.W.3d 729, 732–33 (Tex. Crim. App. 2018) (first citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) and then citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)).

This standard also applies to defensive claims in which the State bears the burden of persuasion. *Saxton v. State*, 804 S.W.2d

[159] Appellant's Br. at 68–113.

910, 914 (Tex. Crim. App. 1991). A defendant bears the burden of producing some evidence to support his defensive claim, after which the State bears the burden of persuasion to disprove the defense beyond a reasonable doubt. *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018); *Saxton*, 804 S.W.2d at 913; *see also* Tex. Penal Code § 2.03. This burden of persuasion does not require the State to produce evidence; it requires only that the State prove its case beyond a reasonable doubt. *Braughton*, 569 S.W.3d at 608–09; *Saxton*, 804 S.W.2d at 913.

To determine the sufficiency of the evidence when a defensive issue was raised at trial, the reviewing court examines all the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and also could have found against the appellant on the defensive issue beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Braughton*, 569 S.W.3d at 609; *Saxton*, 804 S.W.2d at 914. The jury's guilty verdict is an implicit finding that it rejected a defendant's defensive theory, and the reviewing court should simply ensure the jury reached a rational decision. *Braughton*, 569 S.W.3d at 609, 611; *Saxton*, 804 S.W.2d at 913–14.

The sufficiency of the evidence should be reviewed in light of the hypothetically correct jury charge, which accurately sets out the

law, is authorized by the indictment, and does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability. *Cada v. State*, 334 S.W.3d 766, 773–74 (Tex. Crim. App. 2011); *Malik*, 953 S.W.2d at 240.

The reviewing court must defer to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts so long as each inference is supported by the evidence presented at trial. *Braughton*, 569 S.W.3d at 608; *Zuniga*, 551 S.W.3d at 732–33. The reviewing court does not reweigh the evidence or substitute its judgment for that of the factfinder. *Id.*

The reviewing court must presume that the factfinder resolved any conflicting inferences from the evidence in favor of the verdict, and it must defer to that resolution. *Id.* This is because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given their testimony. *Id.* The jury may choose to believe all or any part of any witness's testimony—or none of it. *Metcalf v. State*, 597 S.W.3d 847, 855 (Tex. Crim. App. 2020); *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

2.2. A rational jury could find beyond a reasonable doubt that Appellant intentionally caused Botham's death.

The evidence is legally sufficient to prove that Appellant committed murder because a rational jury could have found all of

the elements of murder beyond a reasonable doubt. A person commits murder if she

> 1) intentionally or knowingly causes the death of an individual, or
> 2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

Tex. Penal Code § 19.02 (b)(1), (2).

These are two different ways of committing the same offense. *Ex parte Rodgers*, 541 S.W.3d 824, 825 (Tex. Crim. App. 2017). When the indictment alleges alternative theories of the same offense and the jury returns a general guilty verdict, that verdict stands if the evidence supports either theory. *Brooks v. State*, 990 S.W.2d 278, 283 (Tex. Crim. App. 1999).

The indictment in this case alleged both alternative theories of murder, and the jury returned a general guilty verdict.[160] Thus, the verdict will stand if the evidence supports either theory. *Brooks*, 990 S.W.2d at 283. The evidence does just that: It shows that Appellant intentionally caused the death of Botham Jean, an individual, by shooting him with a firearm. Tex. Penal Code § 19.02(a)(1).

[160] CR8:2331, 2553.

2.2.1. Appellant committed the offense.

The evidence shows that **Appellant** committed the offense. The State must prove beyond a reasonable doubt that the defendant is the person who committed the offense. *Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984). Appellant admitted that she shot Botham.[161] The bullet recovered from Botham's body matched those in Appellant's gun.[162] There was no evidence that anyone else shot Botham. The State proved Appellant's identity as the murderer beyond a reasonable doubt.

2.2.2. Botham was an individual.

The evidence shows that Botham was **an individual.** An individual is a human being who is alive. Tex. Penal Code § 1.07(a)(26). Botham's sister, Alyssa, identified him as having been a living human being.[163] Botham's neighbors described meeting Botham and talking with him—something that can only be done with a living human being.[164] The State proved beyond a reasonable doubt that Botham was an individual.

2.2.3. Appellant caused Botham's death.

The evidence shows that Appellant **caused Botham's death by shooting him with a firearm**. The defense stipulated that Botham

[161] SE 4, SE 6; RR12:89, 133, 149.
[162] RR11:121–22.
[163] RR8:138, 141; SE 1.
[164] RR9:226; RR10:130, 132.

was the person Appellant killed.[165] Body-worn camera video from responding officers showed Botham bleeding from a gunshot wound and Appellant saying that she had shot him.[166] There were two gunshots and Appellant's gun fired two rounds.[167] The bullet recovered from Botham's body was the same type as those in Appellant's gun.[168] Dr. Gwin testified that the gunshot wound caused Botham's death.[169] The State proved beyond a reasonable doubt that Appellant caused Botham's death by shooting him.

2.2.4. Appellant intended to cause Botham's death.

And the evidence shows that Appellant **intentionally** caused Botham's death. The culpable mental state for murder relates to the result of the conduct, which is causing death. *Cavazos*, 382 S.W.3d at 384; *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003). A person acts intentionally with respect to a result of his conduct when it is his conscious objective or desire to cause the result. Tex. Penal Code § 6.03(a). Thus, to commit an intentional murder, a person must have the conscious objective or desire to cause death. *Lugo-Lugo v. State*, 650 S.W.2d 72, 80–81 (Tex. Crim. App. 1983).

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[165] RR8:152; SE2.
[166] SE 6, 8, 21.
[167] RR11:115–18.
[168] RR11:121–22.
[169] RR10:189–91; SE 268.

A person's intent may be proved by any facts that tend to prove its existence or through circumstantial evidence surrounding the crime, and the jury may infer intent from the acts, words, and conduct of the defendant, or from the method of committing the crime and nature of the wounds on the victim. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004); *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002); *Patrick v. State*, 906 S.W.3d 481, 487 (Tex. Crim. App. 1995). The jury may infer the specific intent to kill from the use of a deadly weapon. *Cavazos*, 382 S.W.3d at 384. A firearm is a deadly weapon. Tex. Penal Code § 1.07(a)(17)(A).

The evidence proved Appellant's intent to kill. Appellant shot Botham with a firearm, which is a deadly weapon.[170] She testified that she "intended to kill" Botham.[171] She was trained to shoot "center mass," and she hit Botham in the chest.[172] The bullet entered Botham's chest at a steep downward angle, which indicated that Appellant shot him while he was either trying to stand up from the couch or ducking in fear.[173] The lack of blood on Appellant's uniform and her unused latex gloves indicated that Appellant did not render first aid.[174] From this evidence—Appellant's use of a deadly weapon,

[170] RR9:59, RR10:191; RR1:125.
[171] RR12:124, 149.
[172] RR8:202; RR9:59, 180; RR12:123.
[173] RR10:183–85, 203; SE 316.
[174] RR11:95–98, 102–03.

her own words, the nature of Botham's injury, and Appellant's conduct—a rational jury could conclude that it was Appellant's conscious objective or desire to cause Botham's death when she shot him.

Viewing the evidence in the light most favorable to the verdict, a rational jury could find beyond a reasonable doubt that Appellant intentionally caused Botham's death. The evidence is therefore legally sufficient to prove the elements of murder.

2.2.5. Appellant's mistaken belief that she was in her apartment does not change her culpable mental state.

Appellant argues that the evidence fails to prove her intent to kill because she "reasonably but mistakenly believed she entered her apartment and an intruder was inside."[175] Her argument appears to be that, regardless of whether the statutory mistake-of-fact defense applies, her mistaken belief about the circumstances negated her culpable mental state. But murder isn't a circumstances-based offense; it's result-based. *Lugo-Lugo*, 650 S.W.2d at 80, 82.

That's why, when the court of appeals first decided *Braughton*, it pointed out that when a murder defendant points to an allegedly mistaken belief about the circumstances surrounding the killing, "this evidence is not relevant to the mental state of intent to kill or cause

[175] Appellant's Br. at 106–09.

serious bodily injury; rather, it supports his defense[] of self-defense…." *Braughton v. State*, 522 S.W.3d 714, 728 (Tex. App.—Houston [1st Dist.] 2017), *aff'd on other grounds*, 569 S.W.3d 592, 606–17 (Tex. Crim. App. 2018).

Appellant's argument is that she thought she was in her own apartment, so she "was frightened and reasonably believed that her life was in danger."[176] But that's not an argument that she lacked the culpable mental state for murder; it's an argument that her conduct was justified by self-defense. *Id.* This brief will address that argument after disposing of Appellant's mistake-of-fact sufficiency argument.

2.3. A rational jury could reject Appellant's mistake-of-fact claim.

Appellant argues that the evidence is insufficient to disprove the mistake-of-fact-defense.[177] The trial court gave a mistake-of-fact instruction, but the jury convicted Appellant.[178] The jury therefore found against Appellant on her mistake-of-fact claim. *See Braughton*, 569 S.W.3d at 609; *Saxton*, 804 S.W.2d at 913–14. This finding was rational because there was no evidence that Appellant held a mistaken belief that negated her culpable mental state.

[176] Appellant's Br. at 108.
[177] Appellant's Br. at 79.
[178] CR8: 2553, 2565–67.

2.3.1. Appellant presented no evidence of mistake of fact, so the hypothetically correct jury charge would not have included this issue, and the State had no burden on it.

The hypothetically correct jury charge in this case would not have contained a mistake-of-fact instruction at all because there was no evidence in this record of any belief that negated Appellant's intent to kill. The defendant is required to produce "*some* evidence" that would support a rational finding in her favor before the burden of persuasion shifts back to the State. *Braughton*, 569 S.W.3d at 608 (emphasis added). Because there was no evidence to support Appellant's mistake-of-fact claim, the jury shouldn't have even been given the option of considering this issue. The jury therefore could rationally find against her on it.

2.3.2. The statutory mistake-of-fact defense isn't an element of self-defense.

Nevertheless, Appellant argues that since, "by a clear mistake of fact, she entered Jean's apartment…reasonably believing that she was entering her apartment," the facts of the case "fit[] squarely within the defense of mistake of fact."[179] Not so. This alleged mistaken belief doesn't negate Appellant's intent to kill, so it doesn't "fit squarely" within mistake of fact. *See Celis*, 416 S.W.3d at 430; *Granger*, 3 S.W.3d at 41; *Gilbert*, 196 S.W.3d at 166; *Huizar*, 720 S.W.2d at 654. Appellant points to no evidence in the record that

[179] Appellant's Br. at 80.

negated her intent to kill; she merely argues that her mistaken belief gave her "the right to act in deadly force in self-defense."[180] Again, that isn't mistake of fact; it's self-defense. *Compare* Tex. Penal Code § 8.02 *with* Tex. Penal Code § 9.32.

This distinction matters. Mistake of fact and self-defense are separate defensive issues in different chapters of the penal code. Mistake of fact "is a defense" under chapter 8, while self-defense is a justification—which, in turn, is a defense—under chapter 9. *Compare* Tex. Penal Code § 8.02 *with* Tex. Penal Code §§ 9.02, 9.31, 9.32.

It's true that a person's reasonable-but-mistaken belief can raise a justification issue. *See Venegas v. State*, 660 S.W.2d 547, 549–50 (Tex. App.—San Antonio 1983, no pet.) (attempted-capital-murder defendant's mistaken belief about identify of intruders, which raised mistake-of-fact defense because it negated two culpable mental states for attempted capital murder, also raised defense-of-property justification). But that's different from "mistake of fact" under section 8.02. Mistake of fact, as defined by section 8.02, isn't an element of any justification under chapter 9. Appellant cannot shoe-horn the statutory mistake-of-fact defense into the separate justification of self-defense.

[180] Appellant's Br. at 80.

2.3.3. Appellant's "persuasive" case from England is anything but.

Appellant offers a case from across the pond, *Jaggard v. Dickinson*, [1981] 72 Cr. App. R. 33 (Eng.), as "persuasive authority" of how "mistake of fact" can be a "defense to prosecution" when a person mistakenly enters the wrong home and commits a crime.[181] There a several problems with this argument.

First, *Jaggard* wasn't a murder case; it was a property-damage case. *Jaggard*, [1981] 72 Cr. App. R. at 34. Unlike murder, property crimes can be circumstances-based in Texas, so a mistaken belief about the ownership of the property can negate the required culpable mental state for a property crime. *See Lynch v. State*, 643 S.W.2d 737, 738 (Tex. Crim. App. 1983).

Second, Jaggard didn't use "mistake of fact" as a "defense to prosecution." *Jaggard,* [1981] 72 Cr. App. R. at 34. Jaggard was intoxicated, and the mistake-of-fact defense is not available to intoxicated defendants. *Id.*, *see also R v. Dowds*, [2012] EWCA (Crim) 281, [2012] 1 Cr. App. R. 34, at 462 (Eng.). Instead, Jaggard relied on a special statutory defense under the 1971 Criminal Damage Act, which provided that she was to be "treated…as having a lawful excuse" if she believed the property owner had consented to the

[181] Appellant's Br. at 100–105. Appellant, using Lexis, cites the All England Law Reports (All E.R.) in her brief. The State, using Westlaw, is citing the Criminal Appeal Reports and, when required, the post-2001 neutral-citation format. See Tables T2.42 and T2.42.1 of The Bluebook. For this Court's convenience, the cited cases and statutes are attached to this brief as Appendices A and B.

damage, and that "it is immaterial whether a belief is justified or not if it is honestly held." *Id.* at 35–36 (citing Criminal Damage Act, 1971, c. 48, § 5 (U.K.)). This defense was available because "a belief can be just as much honestly held if it is induced by intoxication, as if it stems from stupidity, forgetfulness[,] or inattention." *Id.* at 37.

Third, the general mistake-of-fact defense in England is not like the mistake-of-fact defense in Texas. In England, mistake of fact is incorporated into self-defense and defense of property. *See Oraki v. Crown Pros. Serv.*, [2018] EWHC (Admin) 115, [2018] 1 Cr. App. R. 27, at 410–11 (Eng.) (citing Criminal Justice and Immigration Act, 2008, c. 4, § 76 (U.K.)). And it applies even if the actor's belief was unreasonable. *Id.*; *see also R v. Williams*, [1984] 78 Cr. App. R. 276, 280–81 (Eng.).

This isn't England. It's Texas. Under Texas law, Appellant can't claim mistake of fact under the facts of this case. The jury rationally rejected her baseless mistake-of-fact claim. *Braughton*, 569 S.W.3d at 611.

2.4. A rational jury could reject Appellant's self-defense claim.

Appellant also argues that the evidence is insufficient to disprove self-defense.[182] The trial court instructed the jury on the use of deadly force in self-defense.[183] By convicting Appellant, the jury

[182] Appellant's Br. at 81.
[183] CR8:2561–65.

implicitly found against her on this claim and found that her use of deadly force wasn't justified. *See Braughton*, 569 S.W.3d at 609; *Saxton*, 804 S.W.2d at 913–14. This finding was rational because the jury could find that Appellant didn't reasonably believe that deadly force was immediately necessary.

2.4.1. Deadly force in self-defense is only justified if the defendant reasonably believed that deadly force was immediately necessary.

It is a defense to prosecution that the conduct in question was justified under chapter 9 of the penal code. Tex. Penal Code § 9.02. Under section 9.32, a person is justified in using deadly force against another if:

> 1) she would be justified in using force under section 9.31; and
> 2) when and to the degree she reasonably believes the deadly force is immediately necessary to protect herself against the other's use or attempted use of unlawful deadly force or to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Tex. Penal Code § 9.32(a). Under section 9.31, a person is justified in using force against another when and to the degree she reasonably believes the force is immediately necessary to protect herself against the other's use or attempted use of unlawful force. Tex. Penal Code

§ 9.31(a). The use of force is not justified in response to verbal provocation alone. Tex. Penal Code § 9.31(b)(1).

A "reasonable belief" is a belief that would be held by an ordinary and prudent person in the same circumstances as the actor. Tex. Penal Code § 1.07(a)(42). This standard is objective: It "assumes that a defendant may act on appearances as viewed from his standpoint," but it "also assumes the 'ordinary prudent man test of tort law.'" *Werner v. State*, 711 S.W.2d 639, 645 (Tex. Crim. App. 1986).

The defendant can try to side-step this reasonableness inquiry by arguing that her belief is "presumed to be reasonable." An actor's belief that deadly force was necessary is presumed to be reasonable if three facts exist:

1. [the actor] knew or had reason to believe that the person against whom deadly force was used:
    A. unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;
    B. unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or
    C. was committing or attempting to commit [aggravated kidnapping, murder, sexual

assault, aggravated sexual assault, robbery, or aggravated robbery];

2. [the actor] did not provoke the person against whom the force was used; and
3. [the actor] was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

Tex. Penal Code § 9.32(b); *Morales v. State*, 357 S.W.3d 1, 6 (Tex. Crim. App. 2011). This presumption doesn't transform the objective "reasonable belief" standard into a subjective free-for-all, though. If the jury finds beyond a reasonable doubt that the facts giving rise to the presumption do not exist, then the presumption doesn't apply. Tex. Penal Code § 2.05(b)(2)(A).

The first of the facts contains the phrase, "knew or had reason to believe," which requires "evidence that the [defendant] held an opinion or viewpoint about a particular matter…based upon some rational, logical, or supporting ground." *Awde v. State*, No. 07-16-00164-CR, 2017 WL 1908563, at *3–4 (Tex. App.—Amarillo May 3, 2017, pet. ref'd) (mem. op., not designated for publication) (concluding that there must be "reasonable support" for the opinion before the defendant is even entitled to a jury instruction on the presumption). Accordingly, the presumption will not apply if the jury finds beyond a reasonable doubt that the defendant didn't have a

rational, logical, or supporting ground to believe the victim was doing any of the things required for the first fact to exist.

Thus, in a murder case in which the defendant raises both self-defense and the presumption of reasonable belief, the evidence is legally sufficient to reject the defensive issue if the jury could find beyond a reasonable doubt that both 1) the defendant's belief that deadly force was necessary was not presumed to be reasonable because the facts giving rise to the presumption didn't exist, and 2) the defendant did not reasonably believe, under the ordinary-and-prudent-man standard, that deadly force was immediately necessary.

2.4.2. The jury could find that Appellant's belief wasn't presumed reasonable.

The court charged the jury on the presumption of reasonable belief.[184] But the jury didn't have to presume that Appellant's belief was reasonable because it could have found beyond a reasonable doubt that the facts giving rise to the presumption didn't exist. That's because the jury could have rationally concluded that Appellant did not know or have reason to believe that Botham had done or was attempting to do any of the things listed in sec. 9.32(b)(1).

[184] CR8:2562–63.

2.4.2.1. There was no evidence of many of the facts that could give rise to the presumption.

There was no evidence of many of the possibilities. There was no evidence that a "vehicle" or "place of business or employment" was involved, and the jury charge correctly omitted these.[185] There was also no evidence that Appellant thought Botham was committing or attempting to commit aggravated kidnapping, sexual assault, robbery, or aggravated robbery—Appellant testified only that she thought he was going to kill her.[186] There was no evidence that Botham was committing murder, because he didn't kill anyone. There was no evidence that Botham was "attempting to enter" the apartment, because he was already in there when Appellant opened the door.[187] And there was no evidence that Botham removed Appellant from the apartment, because by any account he was still well away from the door when Appellant shot him.[188]

That leaves three possibilities that Appellant could have "had reason to believe":

[185] CR8:2562–63.
[186] RR12:86, 89, 161.
[187] RR12:85.
[188] RR12:89; SE 6, 8, 21.

1) that Botham was attempting to commit murder;
2) that Botham was attempting to remove unlawfully and with force Appellant from her habitation; or
3) that Botham unlawfully and with force entered Appellant's occupied habitation.

The jury could find beyond a reasonable doubt that Appellant did not know or have reason to believe any of these.

2.4.2.2. The jury could find beyond a reasonable doubt that Appellant did not know or have reason to believe Botham was attempting to commit murder or to remove her from her habitation.

Appellant said she believed Botham was going to kill her.[189] She based that on her claims that she believed Botham was in her apartment, Botham didn't obey her order to show his hands, and Botham quickly moved toward her while saying "hey, hey."[190] Despite these claims, a rational jury could have found beyond a reasonable doubt that Appellant did not know or have reason to believe that Botham was attempting to commit murder.

First, the jury, as the exclusive judge of the facts, could have disbelieved Appellant's claims that she ordered Botham to show his hands, that he didn't obey, that he quickly moved toward her, and that he was saying "hey, hey." *Braughton*, 569 S.W.3d at 608; *Metcalf*, 597 S.W.3d at 855; *Sharp*, 707 S.W.2d at 614. That would

[189] RR12:86, 89, 161.
[190] RR12:85–86; *see* Appellant's Br. at 44, 88.

leave nothing at all to support Appellant's belief that Botham was going to kill her.

Second, even if the jury believed Appellant, it could find that she had no rational, logical, or supporting grounds to believe Botham was attempting to commit murder. *See Awde*, 2017 WL 1908563, at *3–4. By Appellant's description, Botham was at most angry, yelling, and lunging, but he wasn't making any threats or brandishing a weapon. That kind of situation only "reasonably suggest[s] a mindset desiring to engage in physical contact," which is assault, not murder. *Id.*, at *4. The jury could therefore rationally find beyond a reasonable doubt that Appellant's belief that she would be killed was mere speculation with no reasonable support. *Id.*at *4–5.

For the same reasons, the jury could have found beyond a reasonable doubt that Appellant did not know or have reason to believe that Botham was attempting to remove her from the apartment. Appellant didn't say she believed this, and the jury could have not believed that Botham was doing anything aggressive when Appellant shot him. *Braughton*, 569 S.W.3d at 608; *Metcalf*, 597 S.W.3d at 855; *Sharp*, 707 S.W.2d at 614. And even if the jury believed Appellant, her description of Botham's actions and words show at most a "mindset desiring to engage in physical contact," not removal from an apartment. *See Awde*, 2017 WL 1908563, at *4–5. There was no rational support for Appellant to believe that Botham

was trying to remove her from the apartment at the time she shot him.

2.4.2.3. The jury could find beyond a reasonable doubt that Appellant did not know or have reason to believe Botham had entered her occupied habitation.

Finally, the jury could have found beyond a reasonable doubt that Appellant did not know or have reason to believe that Botham had unlawfully and with force entered Appellant's occupied habitation, because there was no rational or logical basis for Appellant to conclude that the apartment had been "occupied" when Botham entered it. That's because "occupied," as used here, means that someone was physically present in the habitation.

"Occupied" isn't defined in the penal code, so it must be given its plain meaning, using established canons of construction, to effectuate the intent of the legislature. *Lang v. State*, 561 S.W.3d 174, 179–80 (Tex. Crim. App. 2018). Because "occupied" precedes the list "habitation, vehicle, or place of business or employment," it modifies all three under the series-qualifier canon. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series"). The statute therefore

refers to an "occupied habitation," an "occupied vehicle," and an "occupied place of business or employment."[191]

To effectuate the intent of the legislature, "occupied" must be defined in a way that gives a straightforward, parallel construction to each item in this series. "Occupied" is the past participle of "occupy," a transitive verb that has three possible definitions:

> 1) to take up (a place or extent in space) <this chair is occupied><the fireplace will ~ this corner of the room>; or
> 2) to take or hold possession or control of <enemy troops occupied the ridge>; or
> 3) to reside in as an owner or tenant.

Merriam-Webster's Collegiate Dictionary 858 (11th ed. 2003).

Only the first definition, which requires physical presence, effectuates the intent of the legislature. It gives a straightforward, parallel construction: An actor's habitation, vehicle, and place of business or employment can each be "occupied" if someone is *inside it taking up space*.

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[191] The word "occupied" did not appear in the original bills to create the presumption of reasonable belief. *See* SB 378 (introduced), 80th Leg., R.S. (2007); HB 284 (introduced) 80th Leg., R.S. (2007). Both the House and Senate committees passed substitutes that added the word. *See* SB 378 (committee substitute), 80th Leg., R.S. (2007); HB 284 (committee substitute) 80th Leg., R.S. (2007). They did so to address concerns that the presumption could be invoked even when there is "no one inside" a vehicle "who might be in immediate danger." Testimony on SB 378 in the Senate Jurisprudence Committee, 80th Leg., R.S. (Feb. 28, 2007) (at 23.20 on video); Testimony on HB 284 in the House Criminal Jurisprudence Committee, 80th Leg., R.S. (Feb. 27, 2007) (at 6:00 on video).

The second definition, which requires "possession or control" rather than physical presence, doesn't give a straightforward, parallel construction. A habitation, vehicle, or place of business or employment that the actor has "possession or control of" is already "the actor's," which is another word in the statute that modifies the entire series. This renders the word "occupied" redundant and unnecessary, so it violates the surplusage canon. *See* Scalia & Garner, *Reading Law*, at 174 (no word "should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

The third definition, which also doesn't require physical presence, fails for the same reason. A vehicle or place of business or employment in which a person resides is a "habitation." *See* Tex. Penal Code §§ 9.01(4), 30.01(1)(A) (defining "habitation" as a structure or vehicle that is adapted for the overnight accommodation of persons and includes each separately occupied portion of the structure or vehicle). This, too, makes the word "occupied" redundant and unnecessary.

Only the first definition effectuates the intent of the legislature, and that definition requires physical presence. Thus, to claim the presumption, Appellant had to know or have reason to believe that Botham had entered her apartment while someone was already physically present inside it. But Appellant lived alone, and she had

been at work all day.[192] There was no rational, logical, or supporting ground for her to believe that the apartment was occupied when Botham entered it.

The jury could therefore rationally find beyond a reasonable doubt that the facts giving rise to the presumption of reasonable belief did not exist, and the jury therefore did not have to presume that Appellant's belief was reasonable.

2.4.3. A rational jury could find that Appellant didn't reasonably believe the use of deadly force was immediately necessary.

Not saddled with the presumption, the jury could also have rationally concluded that an ordinary and prudent person in the same circumstances as Appellant would not have believed that deadly force was immediately necessary when she shot Botham.

First, the jury was free to disbelieve Appellant's claim that Botham was engaged in threatening or aggressive behavior when she shot him. All of the evidence that Botham was moving toward Appellant came from her own testimony,[193] which the jury didn't have to believe. *Braughton*, 569 S.W.3d at 608; *Metcalf*, 597 S.W.3d at 855; *Sharp*, 707 S.W.2d at 614.

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[192] RR8:27; RR9:288–89; RR10:81–82; RR12:23, 42, 44; SE 32.
[193] Appellant's Br. at 43 ¶2 (citing RR12:13–86), 44 ¶1 (citing RR12:84–90), 45 ¶¶1–2 (citing RR12:89–124).

Moreover, the angle of the gunshot wound showed that Botham was likely still getting up from the couch when Appellant shot him.[194] And the bullet hole in the wall was inconsistent with Appellant's claim that she shot at Botham while he was coming at her from the window.[195] And despite Appellant's claim that she couldn't see his hands, Botham's shorts didn't have any pockets in which he could have hidden his hands.[196] The jury was free to credit the physical evidence over Appellant's testimony. *Sharp*, 707 S.W.2d at 614. The jury could then rationally conclude that an ordinary and prudent person would not have believed that it was immediately necessary to shoot a man who had been sitting on his couch.

And even if the jury believed that Botham was coming towards Appellant, it could rationally conclude that an ordinary and prudent person in these circumstances wouldn't have decided to shoot another human being without first considering all of her surroundings. An ordinary and prudent person would have stopped and looked around before entering an unlocked apartment that she believed should have been locked, especially when there were no signs of forced entry.[197] An ordinary and prudent person (not to mention a trained police officer) would have used the light switches

[194] RR10:183–85, 203; SE 316.
[195] RR11:74–79, 81–82, 89–94; RR12:121; SE 279, 281.
[196] RR12:50.
[197] RR9:108, 160.

that were within reach and turned the lights on.[198] And even with only the light from the hallway, TV, and laptop, an ordinary and prudent person would have noticed the differences in the apartment—the furniture, the decorations, the mess, the smell of marijuana—and realized she was in the wrong place.[199]

This isn't to say that Appellant had a duty to retreat. Under the circumstances here, Appellant did not have a duty to retreat before using deadly force, and the jury could not consider whether she failed to retreat in deciding whether her belief was reasonable. Tex. Penal Code § 9.32(c)–(d). But even though Appellant didn't have to retreat, the jury could have found that she needed to *stop and think*, even if just for a moment, before shooting and killing a man.[200] Had she done so, she would have seen that Botham was in his own apartment and did not pose any threat at all—much less an immediate threat of deadly force or of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. *See* Tex. Penal Code § 9.32(a)(2).

Assuming for the sake of argument that the circumstances leading up to the shooting matter, the jury could also rationally conclude that an ordinary and prudent person would have known

[198] RR9:50, 87, 95, 160–61, 307–08; RR10:248; SE 29–30.
[199] RR9:54–55, 58, 301, 306; SE 6, 100–01, 230–31.
[200] RR9:52, 68; RR12:210.

that she was at the wrong apartment before ever stepping inside. The jury could find that an ordinary and prudent person who, like Appellant, had lived at the Southside Flats complex for nearly two months,[201] would have:

- noticed the different roofline on the fourth floor of the parking garage;[202]
- noticed the different decorations in the fourth-floor hallway;[203]
- noticed the red doormat outside Botham's apartment;[204]
- noticed the blinking red light when she put her key in the lock, as compared to the green light she would have regularly seen;[205] and
- noticed that the key would not turn, and that the lock did not make a sound.[206]

And the jury could find that an ordinary and prudent person would have known where to look for her lit-up apartment number—and done so when her key didn't work correctly.[207]

Whether the jury disbelieved Appellant completely, or credited the physical evidence over her testimony, or believed Appellant had a duty to stop and think, or believed that Appellant should have

[201] RR9:192; RR12:153; SE 32.
[202] RR9:86; RR10:138–39; SE 27, 28.
[203] RR9:88, 244; RR10:116, 145; RR12:153; SE 73, 75, 76, 78, 88, 89, 91, 93.
[204] RR10:39–40, 137–38; RR10:231; RR11:44, 61,135; SE 95, 97, 228, 265–67.
[205] RR9:158, 210–11, 275, 290–91, 293; RR12:178; SE 17.
[206] RR9:159, 211, 290–91.
[207] RR9:51, 293; RR10:123, 128, 188; RR12:154, 178.

realized where she was, it could have rationally found beyond a reasonable doubt that an ordinary and prudent person in Appellant's circumstances wouldn't have believed that it was immediately necessary to shoot Botham. The jury rationally rejected Appellant's self-defense claim. *Braughton*, 569 S.W.3d at 611.

2.4.4. "Apparent danger" doesn't undercut the jury's verdict.

Appellant nevertheless insists that her mistaken belief that she was in her own apartment was reasonable, and therefore her belief that deadly force was immediately necessary was also reasonable from her standpoint.[208] She argues that under the doctrine of apparent danger, the "jury must view the reasonableness of [her] actions from her standpoint,"[209] and then she sets out "48 distinct factual points proving that [she] acted reasonably under the circumstances."[210] But "apparent danger" doesn't help her.

The doctrine of apparent danger says that the evidence does not have to show that the victim was actually using or attempting to use deadly force, so long as the defendant reasonably believed, as viewed from her standpoint at the time, that deadly force was immediately necessary. *Valentine v. State*, 587 S.W.2d 399, 401 (Tex. Crim. App. 1979).

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[208] Appellant's Br. at 108.
[209] Appellant's Br. at 74–75, 108, 112.
[210] Appellant's Br. at 82–99.

Apparent danger isn't separate from self-defense; it's an application of it. Sometimes, courts have used it as a tool to decide whether the issue of self-defense was raised by the evidence. *See Hamel*, 916 S.W.2d at 493; *Broussard v. State*, 809 S.W.2d 556, 558–59 (Tex. App.—Dallas 1991, pet. ref'd); *Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984). Other times, courts have used it to assess the adequacy of a jury charge that erroneously required the jury to find that the victim was actually using or attempting to use unlawful deadly force before it could acquit the defendant. *See Jones v. State*, 544 S.W.2d 139, 142–43 (Tex. Crim. App. 1976); *Torres v. State*, 7 S.W.3d 712, 714–15 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

What courts haven't used it for is to supplant the jury's prerogative to determine whether a belief is reasonable. Instead, the Court of Criminal Appeals has held that to correctly instruct a jury on self-defense based on apparent danger, the trial court must simply 1) tell the jury that conduct is justified if the defendant reasonably believed it was immediately necessary, and 2) correctly define "reasonable belief." *Valentine*, 587 S.W.2d at 401. The courts of appeals—including this court—agree. *See Cleary v. State*, No. 05-11-00040-CR, 2012 WL 987762, at *3 (Tex. App.—Dallas Mar. 26, 2012, pet. ref'd) (not designated for publication); *see also Fish v. State*, -- S.W.3d --, No. 14-19-00239-CR, 2020 WL 3967979, at *4–5

(Tex. App.—Houston [14th Dist.] Jul. 14, 2020, no pet. h.) (not yet reported); *Buford v. State*, -- S.W.3d --, No. 01-18-01134-CR, 2020 WL 2069243, at *5–6 (Tex. App.—Houston [1st Dist.] Apr. 30, 2020, no pet. h.) (not yet reported); *Bundy v. State*, 280 S.W.3d 425, 430 (Tex. App.—Fort Worth 2009, pet. ref'd); *Lowe v. State*, 211 S.W.3d 821, 824–25 (Tex. App.—Texarkana 2006, pet. ref'd); *Venegas*, 660 S.W.2d at 551.

The court's charge in this case included the correct instruction that *Valentine* prescribes.[211] That instruction gave the jury "all the law applicable to the case." *Buford*, 2020 WL 2069243, at *6. The jury's rejection of self-defense in accordance with that instruction was sufficient to find that Appellant did not act under "a reasonable apprehension of danger." *Valentine*, 587 S.W.2d at 401.

Appellant's "48 distinct factual points proving that [she] acted reasonably" are therefore beside the point. The issue in a legal-sufficiency review isn't whether any rational jury could have found

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[211] CR8:2561–62. The charge also included an additional, two-paragraph instruction on apparent danger that isn't based on anything in chapter 9 of the penal code and instead appears to be based on art. 1226 of the 1925 Penal Code and Tex. Code Crim. Proc. art. 38.36. CR8:2564. The State objected to this instruction as a non-statutory, unnecessary, and improper comment on the evidence. RR14:19–27. *See Beltran De La Torre v. State*, 583 S.W.3d 613, 616, 620 (Tex. Crim. App. 2019) (trial courts should generally avoid including non-statutory instructions in the jury charge because they frequently constitute impermissible comments on the weight of the evidence). Because the jury was also given the correct instruction, this Court need not decide the propriety of the apparent-danger instruction in order to rule against Appellant, and so the State does not raise it as a cross-issue on appeal. *See Pfeiffer*, 363 S.W.3d at 601.

for Appellant on the defensive issue; it's whether any rational jury could have found *against* her. *Braughton*, 569 S.W.3d at 609. And the defensive issue before the jury wasn't whether Appellant *acted* reasonably; it was whether Appellant reasonably *believed* that deadly force was immediately necessary. Tex. Penal Code § 9.32(a)(2). The jury rationally determined that she didn't.

2.5. Conclusion

Viewed in the light most favorable to the verdict, the evidence in this case would allow a rational jury to find beyond a reasonable doubt that Appellant intentionally caused Botham's death, that Appellant didn't have a mistaken belief that negated her intent to kill, and that Appellant didn't reasonably believe that deadly force was immediately necessary. The evidence is legally sufficient to support her conviction.

Response to Appellant's Lesser-Offense Issue

3. There is no reason to change Appellant's conviction because nothing in this record shows that she is guilty of anything but murder.

In her second issue, Appellant argues that "even if" "she did not act reasonably," she was "at most…criminally negligent," so this Court should change her conviction to criminally negligent homicide and remand for a new punishment hearing.[212] This isn't really a separate issue; it's just an alternative request for relief on her legal-sufficiency claim. Because the evidence is sufficient, Appellant isn't entitled to any relief. But in her attempt to argue that she's guilty only of criminally negligent homicide, Appellant illustrates why she is guilty of murder.

Appellant's argument goes like this: 1) manslaughter, which requires recklessness, and criminally negligent homicide, which requires only criminal negligence, are both lesser-included offenses of murder; 2) Appellant's unreasonably walking into the wrong apartment was negligent, not reckless, with respect to whether Botham "would be shot and killed"; therefore, 3) Appellant committed only criminally negligent homicide.[213] Like Appellant's arguments about mistake of fact, this argument misapprehends what it means for homicide offenses to be result-based.

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[212] Appellant's Br. at 114.
[213] Appellant's Br. at 114–19.

3.1. The pertinent result for homicide offenses is death, but Appellant's argument treats the conduct—shooting—as the result.

The different culpable mental states required for murder, manslaughter, and criminally negligent homicide relate to the result of the conduct—causing death. *Montgomery v. State*, 369 S.W.3d 188, 192–93 (Tex. Crim. App. 2012); *Schroeder*, 123 S.W.3d at 400; *Lugo-Lugo*, 650 S.W.2d at 80; *see* Tex. Penal Code §§ 19.02, 19.04, 19.05. A person commits murder "when the conscious objective or desire of the perpetrator was *to cause death* or where the perpetrator was aware that his conduct was reasonably certain *to cause death*." *Lugo-Lugo*, 650 S.W.2d at 80 (emphasis added). A person commits manslaughter when she "is aware of but consciously disregards…a substantial and unjustifiable risk *that the victim would die* as a result of his conduct." *Schroeder*, 123 S.W.3d at 401 (emphasis added). And a person commits criminally negligent homicide if she "ought to have been aware that there was a substantial and unjustifiable *risk of death* from her conduct," but fails to perceive the risk at all. *Montgomery*, 369 S.W.3d at 193 (emphasis added).

The question in this case, then, is "What was Appellant's mental state with respect to whether Botham would die when she shot him?" But Appellant goes back too many steps and instead asks, "What was Appellant's mental state with respect to whether Botham 'would be shot and killed' when she entered his apartment?"

Appellant is treating the criminal *conduct*—shooting Botham—as the criminal *result*. This is incorrect. *See* Tex. Penal Code § 1.07(a)(22)(A), (C) (distinguishing conduct from result); *see also Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994) (holding that "intent to engage in conduct" is not an element of "result of conduct" offenses). Appellant wasn't charged with *entering Botham's apartment* while disregarding a risk that she might shoot him; she was charged with *killing Botham* by shooting him.

3.2. Appellant's argument also focuses on the circumstances, even though she wasn't convicted of a circumstances-based offense.

Appellant also tries to distinguish "conscious risk creation" from "inattentive risk creation" to argue that she was criminally negligent rather than reckless.[214] She points to three things: the apartment complex was confusingly laid out; the apartment doors were poorly assembled; and she failed to notice "three clues"—a large vase in the hall, Botham's doormat, and the apartment number by the door.[215]

But these are just some of the circumstances leading up to the murder. Murder isn't a circumstances-based offense; it's a result-based offense. *Lugo-Lugo*, 650 S.W.2d at 80, 82. Intentional murder *can't* be a circumstances-based offense, because circumstances-based

[214] Appellant's Br. at 116, 118.
[215] Appellant's Br. at 117–18.

offenses can't be committed intentionally. *See Robinson v. State*, 466 S.W.3d 166, 172 (Tex. Crim. App. 2015) (noting that the statutory definition of intent "contains no provision for circumstances surrounding conduct, unlike the definitions" of the other culpable mental states); *cf.* Tex. Penal Code § 6.03(a)–(d). Appellant's mental state regarding the circumstances doesn't affect the offense level for a homicide.

Additionally, the three things that Appellant points to aren't all that happened. After walking down a hallway, ignoring all the signs she was on the wrong floor, stepping on Botham's red doormat, and opening the door to an apartment that looked and smelled different from hers, Appellant aimed her gun and shot Botham in the chest. Botham didn't die because Appellant walked into his apartment; he died because Appellant shot him.

Appellant cites two cases that make this distinction clear.[216] In *Robertson v. State*, 109 S.W.3d 13 (Tex. App.—El Paso 2003, no pet.), Robertson had a seizure while driving and crashed into a home, killing a child. *Id.* at 14. He had a history of accidents caused by seizures, and he misrepresented his medical condition on his drivers-license application. *Id.* at 21. The court of appeals held that these facts showed Robertson consciously disregarded the unjustifiable danger that his driving posed, so the evidence was

[216] Appellant's Br. at 117.

legally sufficient to prove that Robertson recklessly caused the child's death when he decided to drive. *Id*.

In *Payne v. State*, 710 S.W.2d 193 (Tex. App.—Beaumont 1986, no pet.), Payne "was weaving from lane to lane on the highway," "was probably on his fifth can" of beer, and "got off the hard surface of the highway…on the right hand, grass section of the right of way," where he struck a bicyclist, who died. *Id.* at 194. The court of appeals said that these facts were "sufficient to sustain the definition of recklessness." *Id.*

Robertson's reckless conduct was his decision to drive his car, and Payne's reckless conduct was his driving off into the grass. Appellant says that the comparable conduct here is her walking into the wrong apartment. But Appellant wasn't charged with causing Botham's death by being in the wrong apartment; she was charged with causing Botham's death by shooting him.

If Robertson or Payne had aimed their cars at their victims and run them over with the intent to kill them, their cases would be comparable to Appellant's. But that action, with that intent, is murder. *See*, *e.g.*, *Pugh v. State*, No. 11-17-00216-CR, 2019 WL 4130793, at *1 (Tex. App.—Eastland Aug. 30, 2019, pet. granted) (mem. op., not designated for publication) (defendant convicted of murder for running over victim with a car); *Harris v. State*, 152 S.W.3d 786, 788–89 (Tex. App.—Houston [1st Dist.] 2004, pet.

ref'd) (same); *see also Wilson v. State*, 863 S.W.2d 59, 66 (Tex. Crim. App. 1993) (evidence sufficient to support capital murder conviction when defendant knowingly and intentionally ran over the deceased with a vehicle); *Cooper v. State*, 351 S.W.2d 235, 236–37 (Tex. Crim. App. 1961) (evidence sufficient to support murder-with-malice conviction when defendant struck victim with a car); *Tuck v. State*, 231 S.W.2d 436, 438 (Tex. Crim. App. 1950) (evidence sufficient to support murder-with-malice conviction when defendant threw victim from car, ran over her, and then backed over her again).

3.3. *Salinas* doesn't support Appellant's argument; in fact, it shows why she is guilty of murder.

To support her argument that she "did not consciously create the risk that Jean would be shot and killed" by walking into the wrong apartment, Appellant also cites *Salinas v. State*, 644 S.W.2d 744, 746 (Tex. Crim. App. 1983), for the proposition that

> if a person holds a pistol with a round chambered and *without a legitimate reason* shoots and kills another, the person acted recklessly because she consciously created the risk and was aware of the risk surrounding the conduct—that a person *may be shot and killed*.[217]

But that isn't what *Salinas* says. *Salinas* held that in a murder case where the defendant exhibited "a loaded, cocked pistol," the

[217] Appellant's Br. at 116, 117 (emphasis added).

trial court should have given an instruction on involuntary (reckless[218]) manslaughter because the defendant testified that he didn't aim the gun at anyone or intend to kill the victim when "the gun discharged." *Id.* *Salinas* didn't say anything about "the risk that the victim would be shot." Instead, it said that because the defendant had exhibited a loaded, cocked pistol, "we may presume that [he] was aware of the *risk of injury or death*." *Id.* (emphasis added).

In fact, *Salinas* suggests the exact opposite of Appellant's argument: Shooting a person with a loaded gun is not criminally negligent homicide, but rather murder or manslaughter depending on the defendant's intent to kill at the time he fired the gun. *Id.*; *cf.* *Schroeder*, 123 S.W.3d at 401 (analyzing the defendant's mental state "at the time of the firing of the gun"). And since, unlike Salinas, Appellant testified that she aimed the gun at Botham and intended to kill him, *Salinas* confirms that she committed murder, not any lesser-included offense.

3.4. There is no "imperfect self-defense" in Texas that would allow the offense to be reduced the way Appellant asks.

Appellant raises one additional issue by saying that "even if" "she did not act reasonably," she was "at most…criminally

[218] In 1983, a reckless killing was "involuntary manslaughter." *See* Act of May 28, 1973, 63rd Leg., R.S., ch. 426, art. 2, § 1, 1973 Tex. Gen. Laws 1122, 1123–24.

negligent."[219] She appears to be suggesting that her *un*reasonable belief that deadly force was immediately necessary should result in a conviction for a lesser offense. While Appellant doesn't fully develop this argument, it's worth responding to because it seems to raise "imperfect self-defense," which doesn't exist in Texas.

Imperfect self-defense is a legal principle in some states that allows a murder defendant who was unreasonably mistaken about whether she was entitled to use deadly force in self-defense to be convicted of a lesser offense—usually manslaughter or its equivalent—rather than having to face the all-or-nothing choice of a murder conviction or an acquittal. *See*, *e.g. Nelson v. State*, 284 So.3d 711, 716 (Miss. 2019); *Commonwealth v. Busanet*, 54 A.3d 35, 53–54, 56 (Pa. 2012) (citing 18 Pa.C.S. § 2503(b)); *People v. Booker*, 245 P.3d 366, 400 (Cal. 2011); *Commonwealth v. Hager*, 41 S.W.3d 828, 831, 841–42 (Ky. 2001) (citing Ky. Rev. Stat. § 503.120(1)).

Texas has no such law.[220] It's all or nothing. If a murder defendant reasonably believed that deadly force was immediately necessary, she is entitled to an acquittal. Tex. Penal Code §§ 2.03(c),

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[219] Appellant's Br. at 114.

[220] Texas historically used the term "imperfect self-defense" to refer to a common-law rule, which was a corollary to the old provocation law, that when a defendant intended to commit an assault, and then had to kill the victim in self-defense, he would be guilty of manslaughter or murder without malice. *Smith v. State*, 965 S.W.2d 509, 513 (Tex. Crim. App. 1998) (citing *Jones v. State*, 192 S.W.2d 155, 157 (1945)); *Havard v. State*, 800 S.W.2d 195, 206–07 (Tex. Crim. App. 1989).

9.02, 9.32(a). If her belief wasn't reasonable, then she is guilty of murder. *See Braughton*, 569 S.W.3d at 611. There is no middle ground in Texas. When Appellant walked into Botham's apartment, aimed at his chest, and shot him, she became fully liable for intentionally causing Botham's death in the event a jury rejected her self-defense claim—which it did.

3.5. Conclusion

All the evidence in this case shows that Appellant intended to kill Botham when she shot him. That's murder. There is no reason to cast aside the jury's verdict and change Appellant's conviction to criminally negligent homicide.

Prayer

The evidence is sufficient; the conviction is sound. The State prays that this Honorable Court affirm the judgment.

Respectfully submitted,

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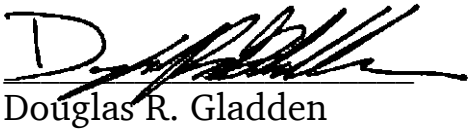

Douglas R. Gladden

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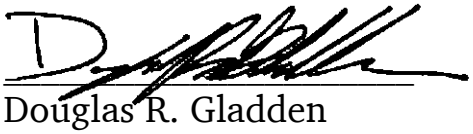

Douglas R. Gladden

APPENDIX A

English Cases

A–1. *Jaggard v. Dickinson*, [1981] 72 Cr. App. R. 33 (Eng.)

***33 Jaggard v. Dickinson**

Image 1 within document in PDF format.

[Divisional Court]
25 July 1980

(1981) 72 Cr. App. R. 33

Lord Justice Donaldson and Mr. Justice Mustill

July 15, 25, 1980

Analysis

Criminal Damage—Defence—Intoxication—Self-induced Intoxication—Offence Not Requiring Proof of Specific Intent—Damage to Property—Honest Belief Lawful Excuse to Damage Property—Whether Defendant's Drunkenness Relevant—Criminal Damage Act 1971 (c. 48) ss. 1 (1), 5 (2), (3) .

Section 1 of the Criminal Damage Act 1971 provides: "(1) A person who without lawful excuse … damages any property belonging to another intending to … damage any such property … shall be guilty of an offence…."

By section 5 : "(1) This section applies to any offence under section 1 (1) above … (2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—(*a*) if at the time of the act or acts alleged to constitute the offence he believed that the person … whom he believed to be entitled to consent to the … damage to the property in question had so consented, or would have consented to it if he … had known of the … damage and its circumstances…. (3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held…."

The defendant one night forced an entry into a house, thereby causing damage to it. She honestly but mistakenly believed that the house in question belonged to a friend of hers who had consented to her treating his property as her own. In fact her friend's house was a short distance away in the same street and was externally identical with the house the defendant had entered. Her mistaken belief was caused by self-induced drunkenness. She ***34** was charged with causing criminal damage to the property contrary to section 1 (1) of the Criminal Damage Act 1971 and at her trial she sought to rely on the defence under section 5 (2) (a) and (3) of the Act of 1971, *i.e.* lawful excuse for the damage based on her honest belief. She was convicted before justices who held that as her belief was brought about by voluntary intoxication the defence under section 5 was not open to her. On appeal, the prosecutor contended that as an offence under section 1 (1) of the Criminal Damage Act 1971 was one of basic intent, drunkenness did not negative the *mens rea* required for its commission, and as absence of lawful excuse was an element of that offence, drunkenness could not be relied upon to support a defence under section 5 (2).

that the principles relating to *mens rea* in offences of basic intent did not apply to the instant case because section 5 (2) and (3) specifically required the Court, when deciding whether there was an honest belief that there was a lawful excuse to damage property, to consider a defendant's actual state of belief, which could be honestly held within section 5 (3) even though it was induced by intoxication; accordingly, the justices had come to the wrong conclusion in deciding that the defendant could not

rely on the defence under section 5 (2) because she was drunk at the time the offence was committed; thus the appeal would be allowed and the conviction quashed.

Director of Public Prosecutions v. Majewski (1976) 62 Cr.App.R. 262; [1977] A.C. 443 explained and distinguished . Stephenson (1979) 69 Cr.App.R. 213; [1979] Q.B. 695 considered .

[For lawful excuse as a defence to a charge of damaging property, see Archbold (40th ed.), para. 2306 . For voluntary intoxication, as a defence, see *ibid.* para. 1448a].

Case stated by Essex Justices sitting at Grays.

This was a case stated by Essex Justices acting in and for the petty sessional division of Thurrock.

On October 12, 1978, an information was preferred by the prosecutor, Detective Chief Inspector James Alexander Dickinson, against the defendant, Beverley Anne Jaggard, that on October 11, 1978, at South Ockendon, Essex, she, without lawful excuse, damaged two window panes and a length of net curtain belonging to Patricia Ann Raven intending to damage them or being reckless whether they would be damaged, contrary to section 1 (1) of the Criminal Damage Act 1971 .

The justices found the following facts. Number 35 Carnach Green, South Ockendon, which was occupied by Mrs. Raven, and 67 Carnach Green, South Ockendon, which was occupied by Ronald Frederick Heyfron, were externally identical properties. The defendant did not know Mrs. Raven and had no contact with her prior to the events giving rise to the charge against the defendant. The defendant did know Mr. Heyfron and their relationship was such that she had his consent at any time to treat his property as if it was her own. At 10.45 p.m. on the day of the offence the defendant was in a state of self induced intoxication and ordered a taxi to take her to 67 Carnach Green, Mr. Heyfron's property, but the taxi delivered her to 35 Carnach Green, Mrs. Raven's property. She entered the garden of 35 Carnach Green and was ordered by Mrs. Raven to remove herself. The defendant then broke the window in the hallway of 35 Carnach Green and then broke the window in the back door of the premises, damaging a net curtain, and gained entry to 35 Carnach Green.

***35**

The defendant contended that at the time she broke into 35 Carnach Green she had a genuine belief she was breaking into 67 Carnach Green and that her relationship with Mr. Heyfron was such that she had his consent to break into 67 Carnach Green and she relied on section 5 (2) of the Criminal Damage Act 1971 as affording her a defence to the charge. The prosecutor contended that she could not rely on the defence in section 5 (2) because the damaged property belonged to someone other than Mr. Heyfron and because the defendant was in a state of self-induced intoxication.

The justices were of the opinion that the defendant believed she was breaking into 67 Carnach Green but that this belief was not a genuine and honest mistake because it was induced by a state of intoxication. Accordingly, they convicted the defendant and fined her £20 and ordered her to pay costs of £10.55 to the prosecutor. The question for the opinion of the Court was whether they were right in deciding that a defendant charged with an offence under section 1 of the 1971 Act could not rely on the defence afforded by section 5 of the Act if the belief relied on was brought about by a state of self-induced intoxication.

The appeal was argued on July 15, 1980.

Nigel Lithman for the defendant. *Andrew Collins* for the prosecutor.

Cur. adv. vult.

July 25. Donaldson L.J.:

I will ask Mustill J. to read the first judgment.

Mustill J.:

On March 21, 1979, Beverley Anne Jaggard was convicted by the justices for the county of Essex on a charge of damaging property, contrary to section 1 (1) of the Criminal Damage Act 1971 . She now appeals to this Court, by way of case stated.

The facts set out in the case are short but striking. On the evening of October 12, 1978, the defendant had been drinking. At 10.45 p.m. she engaged a taxi to take her to 67 Carnach Green, South Ockendon, a house occupied by Mr. R. F. Heyfron, a gentleman with whom she had a relationship such that, in the words of the justices, she had his consent at any time to treat his property as if it was her own. Alighting from the taxi, she entered the garden, but was asked to leave by a Mrs. Raven, who was a stranger to her. Persisting, she broke the glass in the hallway of the house. She then went to the back door, where she broke another window, and gained entry to the house, damaging a net curtain in the process. At some time thereafter, in circumstances not described by the justices, it became clear that the house was not 67 Carnach Green, but 35 Carnach Green, a house of identical outward appearance, occupied by Mrs. Raven. The justices have found that the defendant did believe that she was breaking into the property of Mr. Heyfron, but that this mistake was induced by a state of self-induced intoxication.

In these circumstances, the prosecutor prosecuted the defendant for an offence under section 1 (1) of the 1971 Act, which reads as follows: “A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.”

At the hearing before the justices the defendant relied on the following provisions of section 5 of the Act: “5 (2) A person charged with an offence to ***36** which this section applies shall, whether or not he would be treated for the purposes of the Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—(*a*) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances … “(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.”

It is convenient to refer to the exculpatory provisions of section 5 (2) as if they created a defence, whilst recognising that the burden of disproving the facts referred to by the subsection remains on the prosecution.

The justices held that the defendant was not entitled to rely on section 5 (2) of the Act, since the belief relied upon was brought about by a state of self-induced intoxication.

In support of the conviction Mr. Collins advanced an argument which may be summarised as follows:

(1) Where an offence is one of "basic intent," in contrast to one of "specific intent," the fact that the accused was in a state of self induced intoxication at the time when he did the acts constituting the *actus reus* does not prevent him from possessing the *mens rea* necessary to constitute the offence: D.P.P. v. Morgan (1975) 61 Cr.App.R. 136; [1976] A.C. 182 ; D.P.P. v. Majewski (1976) 62 Cr.App.R. 262; [1977] A.C. 443 . (2) Section 1 (1) of the 1971 Act creates an offence of basic intent: Stephenson (1979) 69 Cr.App.R. 213; [1979] Q.B. 695 . (3) Section 5 (3) has no bearing on the present issue. It does not create a separate defence, but is no more than a partial definition of the expression "without lawful excuse" in section 1 (1). The absence of lawful excuse forms an element in the *mens rea* : Smith (David Raymond) (1973) 58 Cr.App.R. 320, 327; [1974] Q.B. 354, 360 . Accordingly, since drunkenness does not negative *mens rea* in crimes of basic intent, it cannot be relied upon as part of a defence based on section 5 (2).

Whilst this is an attractive submission, we consider it to be unsound, for the following reasons.

In the first place, the argument transfers the distinction between offences of specific and of basic intent to a context in which it has no place. The distinction is material where the accused relies upon his own drunkenness as a ground for denying that he had the degree of intention or recklessness required in order to constitute the defence. Here, by contrast, the defendant does not rely upon her drunkenness to displace an inference of intent or recklessness; indeed she does not rely upon it at all. Her defence is founded on the state of belief called for by section 5 (2). True, the fact of the defendant's intoxication was relevant to the defence under section 5 (2), for it helped to explain what would otherwise have been inexplicable, and hence lent colour to her evidence about the state of her belief. This is not the same as using drunkenness to rebut an inference of intention or recklessness. Belief, like intention or recklessness, is a state of mind: but they are not the same states of mind.

Can it nevertheless be said that, even if the context is different, the principles established by D.P.P. v. Majewski (*supra*) ought to be applied to this new situation? If the basis of the decision in D.P.P. v. Majewski (*supra*) had been that drunkenness does not prevent a person from having an intent or being reckless, ***37** then there would be grounds for saying that it should equally be left out of account when deciding on his state of belief. But this is not in our view what D.P.P. v. Majewski (*supra*) decided. The House of Lords did not conclude that intoxication was irrelevant to the fact of the accused's state of mind, but rather that, whatever might have been his actual state of mind, he should for reasons of policy be precluded from relying on any alteration in that state brought about by self-induced intoxication. The same considerations of policy apply to the intent or recklessness which is the *mens rea* of the offence created by section 1 (1), and that offence is accordingly regarded as one of basic intent: Stephenson (*supra*). It is indeed essential that this should be so, for drink so often plays a part in offences of criminal damage; and to admit drunkenness as a potential means of escaping liability would provide much too ready a means of avoiding conviction. But these considerations do not apply to a case where Parliament has specifically required the Court to consider the accused's actual state of belief, not the state of belief which ought to have existed. It seems to us to show that the Court is required by section 5 (3) to focus on the existence of the belief, not its intellectual soundness; and a belief can be just as much honestly held if it is induced by intoxication, as if it stems from stupidity, forgetfulness or inattention.

It was, however, urged that we could not properly read section 5 (2) in isolation from section 1 (1), which forms the context of the words, "without lawful excuse," partially defined by section 5 (2). Once the words are put in context, so it is maintained, it can be seen that the law must treat drunkenness in the same way in relation to lawful excuse (and hence belief) as it does to intention and recklessness: for they are all part of the *mens rea* of the offence. To fragment the *mens rea* , so as to treat one part of it as affected by drunkenness in one way, and the remainder as affected in a different way, would make the law impossibly complicated to enforce.

If it had been necessary to decide whether, for all purposes, the *mens rea* of an offence under section 1 (1) extends as far as an intent (or recklessness) as to the existence of a lawful excuse, I should have wished to consider the observations of James L.J. delivering the judgment of the Court of Appealin Smith (David) (*supra*) at p. 327 and p. 360 respectively. I do not however find it necessary to reach a conclusion on this matter, and will only say that I am not at present convinced that, when these observations are read in the context of the judgment as a whole, they have the meaning which the prosecutor has sought to put upon them. In my view, however, the answer to the argument lies in the fact that any distinction which has to be drawn as to the effect of drunkenness arises from the scheme of the Act itself. No doubt the *mens rea* is in general indivisible, with no distinction being possible as regards the effect of drunkenness. But Parliament has specifically isolated one subjective element, in the shape of honest belief, and has given it separate treatment, and its own special gloss in section 5 (3). This being so, there is nothing objectionable in giving it special treatment as regards drunkenness, in accordance with the natural meaning of the words.

In these circumstances, I would hold that the justices were in error when they decided that the defence furnished to the defendant by section 5 (2) was lost because the defendant was drunk at the time. I would therefore allow the appeal.

Donaldson L.J. : I agree, but in deference to the very careful arguments with which we have been assisted in this case, I would like to express my own view albeit briefly.

***38**

As I understand the law as expounded in D.P.P. v. Majewski (1976) 62 Cr.App.R. 262; [1977] A.C. 443 , where self-induced intoxication in fact deprives an accused person of the mental ability to form a relevant intent, but otherwise the essential ingredients of the offence are proved, his liability to conviction will depend upon whether the relevant intent was a general or basic intent or a specific intent. If only a general or basic intent is required, the effects of the intoxication cannot be relied upon. *Aliter* , if a specific intent is required.

The distinction between a general or basic intent and a specific intent is that whereas the former extends only to the *actus reus* , a specific intent extends beyond it.

The *actus reus* in section 1 (1) of the Criminal Damage Act 1971 consists of destroying or damaging the property of another and the *mens rea* consisting of an intent or recklessness and absence of lawful excuse is co-extensive (see Smith (David) (1973) 58 Cr.App.R. 320, 327, [1974] Q.B. 354, 360 , *per* James L.J.). Accordingly this is a crime of basic intent and was so held in O'Driscoll (1977) 65 Cr.App.R. 50, 55 where Waller L.J. also pointed to the contrast between section 1 (1) and section 1 (2) , where a further and specific intent was required, namely, an intent by the criminal damage to endanger the life of another.

If, therefore, the statute had not contained section 5, there would be no problem. The defendant would have been rightly convicted. The question for us, and so far as I know it is a completely novel question, is whether section 5 makes any difference.

The law in relation to self-induced intoxication and crimes of basic intent is without doubt an exception to the general rule that the prosecution must prove the actual existence of the relevant intent, be it basic or specific (see Stephenson (1979) 69 Cr.App.R. 213, 220, [1979] Q.B. 695 , *per* Lane L.J.). And in section 5 Parliament has very specifically extended what would otherwise be regarded as "lawful excuse" by providing that it is immaterial whether the relevant belief is justified or not provided that it is honestly held. The justification for what I may call the Majewski exception, although it is much older than that decision, is said to be that the course of conduct inducing the intoxication supplies the evidence of *mens rea* (see *per* Lord Elwyn Jones L.C. (1976) 62 Cr.App.R. at p. 270 ; [1977] A.C. at pp. 474–475). It seems to me that to hold that this substituted *mens rea* overrides so specific a statutory provision, involves reading section 5 (2) as if it provided that "for the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held and the honesty of the belief is not attributable only to self-induced intoxication." I cannot so construe the section and I too would therefore allow the appeal.

The Court certified under section 1 (2) of the Administration of Justice Act 1960 the following to be a point of law of general public importance, namely, "Whether it is a defence to a charge under section 1 (1) of the Criminal Damage Act 1971 that a defendant, as a result of self-induced intoxication, has an honest belief that a state of affairs exists that in all other respects constitutes a lawful excuse within section 5 (2) (*a*) and (3) of the said Act," but refused leave to appeal to the House of Lords. Donaldson L.J., added the following observation: ***39** "I think it would be contrary to modern precedent for us to give leave, but I think it would not be stepping outside my judicial function to say I should be extremely interested to know what the views of the House of Lords were."

Representation

- Solicitors: Roberts-Morgan, Shaen, Roscoe & Co., Stanford-le-Hope , for the defendant. T. Hambrey-Jones, Chelmsford , for the prosecutor.

Appeal allowed.

(1981) 72 Cr. App. R. 33

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A–2. *R v. Dowds*, [2012] EWCA (Crim) 281, [2012] 1 Cr. App. R. 34 (Eng.)

***455 R. v. Dowds**

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Court of Appeal (Criminal Division)
22 February 2012

[2012] EWCA Crim 281

[2012] 1 Cr. App. R. 34

Vice President (Lord Justice Hughes) , Mr Justice Simon and Mrs Justice Lang
December 1, 2011; February 22, 2012

Analysis

Diminished responsibility; Murder; Voluntary intoxication;

H1

Homicide—Diminished responsibility—Voluntary intoxication—Whether "recognised medical condition"—Whether in principle giving rise to the defence of diminished responsibility following statutory amendment—Homicide Act 1957 s.2 (5 and 6 Eliz.2, c.11) (as amended by Coroners and Justice Act 2009 (c.25) s.52(1))

The defendant killed his partner by repeatedly stabbing her. At his subsequent trial on a count of murder, the defendant sought to rely on the partial defence of diminished responsibility, pursuant to s.2 of the Homicide Act 1957, as amended, [1] on the ground that at the time of the killing he had been intoxicated by alcohol and unable to form the necessary intent. The judge held that voluntary and temporary drunkenness was not capable of founding the defence of diminished responsibility. Accordingly, it was not raised before the jury and the defendant was convicted of murder. The defendant appealed on the ground that s.2 , as amended, commanded attention to the question whether there was an abnormality of the mental functioning attributable to a "recognised medical condition", and where, according to certain medical classifications, acute intoxication was such a condition, therefore, while intoxication had not been a defence under s.2 as originally enacted, following its amendment temporary drunkenness could give rise to diminished responsibility.

Held, dismissing the appeal, that the exception which prevented a defendant from relying on his voluntary intoxication, except on the limited question of whether a specific intent had been formed, was well entrenched and formed the unspoken backdrop for the new statutory formula. It was quite clear that the reformulation of the statutory conditions for diminished responsibility was not intended to reverse the well established rule that voluntary acute intoxication was not capable of being relied on to found diminished responsibility. Further, an alternative construction was not required by the principle that where a penal provision was reasonably capable of two interpretations, the most favourable to the accused should be adopted. The rationale for the principle was that citizens should be given fair warning of conduct which might attract punishment, but there was simply no occasion that could be envisaged in which any citizen might order his affairs on the basis of a misunderstanding of the extent of the partial defence of diminished responsibility. ***456** The act of killing, with intent either to kill or cause grievous bodily harm, and without justification, had to have taken place before there could be any question of the partial

defence arising, and there was no risk of the legal character of that act being misunderstood. Accordingly, voluntary acute intoxication, whether from alcohol or other substance, was not capable of founding the defence of diminished responsibility (post [35], [36], [38]. [40], [41], [42]).

Dicta of Sir Igor Judge P. in R. v Wood (Clive) [2008] EWCA Crim 1305; [2008] 2 Cr. App. R. 34 (p.507); [2009] 1 W.L.R. 496 at [23] applied.

Per curiam. We do not think that we should rule out the possibility that there may be genuine mental conditions, in no sense the fault of the defendant and well recognised by doctors, which although temporary may be within the ambit of the Act (post [39]).

(For s.2 of the Homicide Act 1957, as amended by s.52(1) of the Coroners and Justice Act 2009, see Archbold 2012, para.19-66.)

H7 Additional cases referred to in the judgment of the court:

- Brennan v HM Advocate 1977 JC 38 HCJ
- Director of Public Prosecutions v Majewski (1976) 62 Cr. App. R. 5; [1975] 3 W.L.R. 401; (1976) 62 Cr. App. R. 262; [1977] A.C. 443; [1976] 2 W.L.R. 623 HL
- Jaggard v Dickinson (1981) 72 Cr. App. R. 33; [1981] Q.B. 527; [1981] 2 W.L.R. 118 DC
- Kokkinakis v Greece (1994) 17 E.H.R.R. 397
- R. v Bouchard-Lebrun 2011 SCC 58; [2011] 3 S.C.R. 575 Supreme Court of Canada
- R. v Dietschmann [2003] UKHL 10; [2003] 2 Cr. App. R. 4 (p.54); [2003] 1 A.C. 1209; [2003] 2 W.L.R. 613
- R. v Fenton (1975) 61 Cr. App. R. 261 CA
- R. v Fotheringham (1989) 88 Cr. App. R. 206 CA
- R. v O'Grady (1987) 85 Cr. App. R. 315; [1987] Q.B. 995; [1987] 3 W.L.R. 321 CA
- R. v JTB [2009] UKHL 20; [2009] 2 Cr. App. R. 13 (p.189); [2009] 1 A.C. 1310; [2009] 2 W.L.R. 1088
- R. v Stewart (James) [2009] EWCA Crim 593; [2009] 2 Cr. App. R. 30 (p.500); [2009] 1 W.L.R. 2507
- R. v Woods (Walter) (1982) 74 Cr. App. R. 312 CA
- R. (Junttan Oy) v Bristol Magistrates' Court [2003] UKHL 55; [2003] I.C.R. 1475
- Reniger v Fogossa (1551) 1 Plowden 1; 75 E.R. 1 Court of Exchequer Chamber
- Sweet v Parsley (1969) 53 Cr. App. R. 221; [1970] A.C. 132; [1969] 2 W.L.R. 470 HL

H8 Additional cases referred to in argument:

- R. v Byrne (1960) 44 Cr. App. R. 246; [1960] 2 Q.B. 396; [1960] 3 W.L.R. 440 CCA
- R v Tandy (1988) 87 Cr. App. R. 45; [1989] 1 W.L.R. 350 CA

Appeal against conviction

On June 3, 2011 in the Crown Court at Wolverhampton (Judge Wait), the defendant, Stephen Andrew Dowds, was convicted of murder. He was sentenced ***457** to life imprisonment with a minimum specified period of 17 years. He appealed against conviction on the grounds that the judge was wrong to rule that acute voluntary intoxication could not be classified as a medical condition capable of founding the defence of diminished responsibility.

The facts appear in the judgment of the court.

H11 Representation

- Sally O'Neill QC (instructed by Stevens Solicitors, Wolverhampton) for the defendant.
- Andrew Lockhart QC (instructed by Crown Prosecution Service, Birmingham) for the Crown.

The court took time for consideration.

Hughes L.J. (VICE PRESIDENT):

The issue in this appeal is whether acute voluntary intoxication is now capable of giving rise to the partial defence of diminished responsibility on an indictment for murder. It is common ground that it could not have done so prior to the amendments to s.2 of the Homicide Act 1957 which were made by s.52 of the Coroners and Justice Act 2009 . The appellant contends that those amendments mean that voluntary and temporary drunkenness may now give rise to diminished responsibility and thus reduce murder to manslaughter. That is because, it is said, acute intoxication is a "recognised medical condition" within s.2(1)(a) of the Homicide Act 1957 as amended.

The appellant is a 49-year-old college lecturer. He has no previous convictions. Over the weekend of November 19–21, 2010 he killed his partner of about 18 months at the house which they shared. He inflicted approximately 60 knife wounds to her, chiefly stabs and chiefly about the neck, where he severed the carotid artery causing injury from which she would have died within seconds. Both he and she were habitual heavy binge drinkers. There had been a long history of violent episodes between them, some (and on his account nearly all) initiated by her and most, but not all, when one or both was drunk. The indications are that the fatal argument probably took place at about 01.19 on the morning of Saturday, November 20, because the deceased made an interrupted 999 call at that hour and not long afterwards the appellant made a number of text or telephone calls to others, including his ex-wife and a former girlfriend, from which it might be inferred that the deceased was by then dead. Nearly two days later, at just before 19.00 in the evening of Sunday, November 21, the appellant telephoned the police to report that his partner was dead. Then and subsequently, including at trial, he asserted that he had no recollection whatever of the events which had led to the death of the deceased, but he did not dispute that he must have been responsible for her wounds.

Before the jury at trial, the principal issues left to be determined were:

- i) intent; had the appellant intended death or serious bodily harm? And
- ii) loss of self control (s.54 of the Coroners and Justice Act 2009); had the defendant lost his self control as a result of an attack by the deceased causing him to fear serious violence, and then reacted in a manner in which a reasonable person might have done in such circumstances?

Those issues entailed an examination of the history of the relationship between the appellant and the deceased, the level of drunkenness and the asserted loss of ***458** memory. The jury by its verdict found that he had intended serious harm and rejected the partial defence under s.54 .

It was common ground that the appellant and the deceased had both been drinking heavily that night, as was their habit at a weekend. They had bought a litre bottle of vodka at about 17.00 on Friday afternoon, and the appellant had returned to the off licence to buy another similar bottle at about 22.00, that is to say before the killing. The appellant asserted that he had been drunk at the time of the killing, that in consequence he could not form the intention to kill or do serious harm, and that this was the reason he could remember nothing about it. Those latter assertions were disputed by the Crown. Nevertheless, whatever the exact facts of the drinking and asserted loss of memory were, there was clearly every likelihood that the killing had occurred when the appellant was to an extent intoxicated.

It was not contended that the appellant was alcoholic or clinically dependent on drink. He was a heavy but elective drinker. On his own account he did not drink heavily except when he chose to do so, chiefly at weekends. He held down a responsible job which required him to be alert and clear thinking. His drinking was appropriately described by one of the reporting psychiatrists as "binge drinking". The appellant himself told the other reporting psychiatrist:

> "I do not have a problem with drink. I have a problem when I drink, I just don't know when to stop. I just seem to be able to carry on drinking and I don't have any ill effect in the morning. I get a head on me and want to keep on drinking."

At the outset of the trial, Judge Wait was invited to rule whether or not simple voluntary and temporary drunkenness was capable of founding the partial defence of diminished responsibility. He ruled that as a matter of law it could not. In consequence, diminished responsibility was not raised before the jury. This appeal challenges that ruling. Whilst the present offence concerns intoxication with alcohol, our conclusion must apply equally to defendants under the influence of other voluntarily-taken drugs.

Section 2 of the Homicide Act 1957

As amended by s.52(1) of the Coroners and Justice Act 2009, this section now reads, so far as material:

"Persons suffering from diminished responsibility

- 2(1) A person (D) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which –
  - (a) arose from a recognised medical condition,
  - (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
  - (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
- (1A) Those things are –
  - (a) to understand the nature of D's conduct;
  - (b) to form a rational judgment;
  - (c) to exercise self control. ***459**
- (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.
- (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
- (3) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter."

Those new provisions of s.2(1), (1A) and (1B) have been substituted for the previous statutory definition of diminished responsibility which read:

- "(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

The former law

English law (unlike Scots law) knew no concept of diminished responsibility as a partial defence to murder until the passing of the Homicide Act 1957 in the terms set out in [8] above. As a matter of history, the partial defence was introduced at a time of mounting public concern about the death penalty. There had been a Royal Commission on the death penalty (*Report of the Royal Commission on Capital Punishment (1949–1953)* (HMSO 1953), which, amongst its deliberations, had considered the advantages of a partial defence of diminished responsibility but opted instead for a proposed revision of the law of insanity. There had then been a private member's bill to abolish the death penalty which, although defeated in the House of Lords, reflected general concern. In the end, the legislative solution adopted was the creation of a partial defence of diminished responsibility rather than any revision of the law of insanity.

It was established in 1975 in R. v Fenton (1975) 61 Cr. App. R. 261 that the effect on the mind of voluntary intoxication could not give rise to diminished responsibility. The defendant, who had shot four people in two different locations, had a number of other conditions, including paranoid psychopathy, which *did* raise the possibility of diminished responsibility, although the jury had rejected that defence. The trial judge had directed the jury to consider those but to leave out of account the defendant's heavy intoxication. This court held that the judge had been correct. The reasoning of Lord Widgery C.J. was brief:

"We recognise that cases may arise hereafter where the accused proves such a craving for drink or drugs as to produce in itself an abnormality of mind; but that is not proved in this case. The appellant did not give evidence and we do not see how self-induced intoxication can of itself produce an abnormality of mind due to inherent causes."

It is perhaps significant that counsel for the defendant had felt able to argue his case only on the basis that a craving for, or an inability to resist the temptations ***460** of, drink was a feature of psychopathy, and thus became relevant to diminished responsibility indirectly. No one suggested that simple drunkenness could found a defence of diminished responsibility, and on the facts of the case a craving for, or inability to resist the need of, drink was not shown.

The law as explained in Fenton was never significantly questioned. It was in due course endorsed by the House of Lords in R. v Dietschmann [2003] 2 Cr. App. R. 4 (p.54); [2003] 1 A.C. 1209 . That case resolved an uncertainty about how to approach the case of a defendant who suffered *both* from a mental abnormality and was also intoxicated. The House of Lords held that the correct approach was for the jury to ignore the effects of intoxication and to ask whether, leaving out the drink, the defendant's other condition(s) of mental abnormality substantially impaired his responsibility for the killing. It was treated as axiomatic that simple voluntary drunkenness was incapable of founding a plea of diminished responsibility.

As foreshadowed in Fenton the courts also had to deal with cases where the defendant's condition went beyond simple drunkenness into physical or psychological addiction such as, arguably, to amount to a mental abnormality. In dealing with such cases it was once again treated as axiomatic that simple voluntary drunkenness without such additional condition was incapable of founding the plea of diminished responsibility. See, most recently, R. v Wood (Clive) [2008] EWCA Crim 1305;

[2008] 2 Cr. App. R. 34 (p.507)—in particular, [23]—and R. v Stewart (James) [2009] EWCA Crim 593; [2009] 2 Cr. App. R. 30 (p.500)—in particular, [26] and [29].

This court's judgment in Wood (Clive) usefully explains what is very clearly the case. The axiomatic rule that simple voluntary drunkenness, without more, cannot found diminished responsibility is not a rule special to the partial defence. It is but one example of the general approach of English criminal law to voluntary drunkenness. Sir Igor Judge P. put it in this way in Wood (Clive) at [23]:

> "Dealing with the point very broadly, the consumption of alcohol before a defendant acts with murderous intent and kills cannot, without more, bring his actions within the concept of diminished responsibility. On its own, voluntary intoxication falls outside the ambit of the defence. This is consistent with the general approach of the law that, save in the context of offences of specific intent and proof of that intent, criminal acts committed under the influence of self induced intoxication are not for that reason excused. Public policy proceeds on the basis that a defendant who voluntarily takes alcohol and behaves in a way in which he might not have behaved when sober is not normally entitled to be excused from the consequences of his actions."

It is true that in the particular case of diminished responsibility under the original form of s.2 of the Homicide Act 1957 , there was an additional reason why simple voluntary drunkenness could not found the defence. That was because it could not readily be brought within the expression "inherent cause" and clearly had none of the other sources listed in the bracketed clause in the section. But there can be no doubt that, independently of the particular statutory language, the general principle to which Sir Igor Judge P. referred in Wood (Clive) does indeed underlie English criminal law. ***461**

Voluntary drunkenness in English criminal law

The leading case is of course Director of Public Prosecutions v Majewski (1976) 62 Cr. App. R. 262; [1977] AC 443 . In the course of deciding that voluntary drunkenness could be taken into account only in a case categorised as one of specific intent, and only in deciding whether such intent had been present, the House reviewed the historical development of the law, which is also chronicled in "The Defence of Drunkeness in Criminal Law" (1933) 49 L.Q.R. 528. From early times English common law regarded voluntary drunkenness as providing no excuse, indeed as normally amounting to aggravation of the offending rather than any excuse for it. Lord Edmund-Davies observed at 281 and 488 that:

> "Aristotle, apparently, approved of the *double* penalisation of intoxicated harm-doers (*Ethics* Book III ch 5, 1113b, 31) and for a long time judges in this country regarded voluntary drunkenness as aggravating culpability rather than as lessening or eliminating it."

In 1551 the Court of Exchequer Chamber had held in Reniger v Fogossa (1551) 1 Plow. 1; 75 ER 1 that:

> "If a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby."

Similarly, Hooker held (*Laws of the Ecclesiastical Polity)* in the late 16th Century that drink was no excuse (at Book 1, Ch.ix 2):

> "in as much as himself might have chosen whether his wits should by that mean have been taken from him."

There are observations to identical effect in *Coke* (Co Litt 247a), *Hale* (1 Pleas of the Crown 32), *Blackstone* (4 Comm. 26), *Chitty* (Criminal Law, Vol.iii, p.725 (1816)), *Russell* (Crimes and Misdemeanors, Vol.I, p.11 (1819)) and in many other places.

In the 19th Century, the courts began to relax the law to the extent that drink was recognised as being capable of preventing the formation of specific intent. That development carried through, in the end, to the decision in Majewski . It is perhaps of passing interest that Hale had also anticipated the distinction made in Wood (Clive) and similar cases, in recognising that his general rule might be different if, instead of "simple phrenzy occasioned immediately by drunkenness" there was "an habitual or fixed phrenzy … though this madness was contracted by the vice ... " (*Hale* , op cit, pp.31–32).

Specific intent apart, there is no doubt about the general approach of the law to voluntary drunkenness. The speeches in Majewski make it clear. Both Lord Elwyn-Jones L.C. (at 268 and 471) and Lord Edmund-Davies (at 286 and 494) approved what Lawton L.J. had said in the Court of Appeal ((1976) 62 Cr. App. R. 5, 13; [1975] 3 W.L.R. 401, 411) viz:

> "Although there was much reforming zeal and activity in the 19th century, Parliament never once considered whether self-induced intoxication should be a defence generally to a criminal charge. It would have been a strange ***462** result if the merciful relaxation of a strict rule of law had ended, without any Parliamentary intervention, by whittling it away to such an extent that the more drunk a man became, provided it stopped short of making him insane, the better chance he had of an acquittal … . The common law rule still applied but there were exceptions to it which Lord Birkenhead LC tried to define by reference to specific intent."

Lord Simon of Glaisdale (at 272 and 476) added this:

> "One of the prime purposes of the criminal law, with its penal sanctions, is the protection from certain proscribed conduct of persons who are pursuing their lawful lives. Unprovoked violence has, from time immemorial, been a significant part of such proscribed conduct. To accede to the argument on behalf of the appellant would leave the citizen legally unprotected from unprovoked violence where such violence was the consequence of drink or drugs having obliterated the capacity of the perpetrator to know what he was doing or what were its consequences."

Lord Salmon (at 276 and 482) said this of the distinction between basic and specific intent which the House upheld:

> "The answer is that in strict logic this view cannot be justified. But this is the view that has been adopted by the common law of England, which is founded on common sense and experience rather than strict logic."

This general approach can be seen, for example, in the rule that, whilst ordinarily a man is to be judged on the facts as he honestly believed them to be, he is not entitled to rely on a mistake which is the result of voluntary intoxication: see *R. v O'Grady* (1987) 85 Cr. App. R. 315; [1987] Q.B. 995 (self-defence) and R. v Fotheringham (1989) 88 Cr. App. R. 206 (rape)—cf. Jaggard v Dickinson (1981) 72 Cr. App. R. 33; [1981] Q.B. 527 which appears out of line with other cases but depended on the specific words of the statute. The same rule is sometimes specifically recognised in statute. Section 6(5) of the Public Order Act 1986 provides:

- "(5) For the purposes of this section a person whose awareness is impaired by intoxication shall be taken to be aware of that of which he would be aware if not intoxicated, unless he shows either that his intoxication was not self-induced or that it was caused solely by the taking or administration of a substance in the course of medical treatment."

Likewise, s.76 of the Criminal Justice and Immigration Act 2008 puts the law of self-defence into statutory form. It stipulates by s.76(3) and (4) that the case is to be judged according to the facts as the defendant believed them to be, but s.75(5) provides:

- "(5) But subsection 4(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced."

On other occasions a statute simply assumes the general approach, in much the same way as it may assume other ordinary principles of the law. The law of rape, as it stood in 1980 under the Sexual Offences (Amendment) Act 1976 , provided that the presence or absence of reasonable grounds for a belief in consent was a ***463** matter to be considered in deciding whether the defendant believed the woman was consenting. In R. v Woods (Walter) (1982) 74 Cr. App. R. 312 this court confronted the argument that, because that meant that actual belief in consent was a defence whether reasonable or not, it also followed that such belief was a defence whether attributable to drink or not. Griffiths L.J. dealt with it thus at 314–315:

"If Parliament had meant to provide in future that a man whose lust was so inflamed by drink that he ravished a woman, should nevertheless be able to pray in aid his drunken state to avoid the consequences we would have expected them to have used the clearest words to express such a surprising result, which we believe would be utterly repugnant to the great majority of people. We are satisfied that Parliament had no such intention."

Thus, actual belief in consent was indeed the test, but there was an exception for a belief attributable to voluntary drunkenness. Parliament had passed the statute against the background of the general principle of the criminal law as to voluntary intoxication. Specific provision in the statute was unnecessary.

The Law Commission reviewed the position in *Intoxication and Criminal Liability* , Law Com. No.314 (2009). Its recommendation was for specific statutory enactment of the general rule that voluntary intoxication cannot be relied upon and for the stipulation for particular, and limited, exceptions. That recommendation has not been acted upon, but the extensive consultation process undertaken demonstrated clearly the acceptance of, and justification for, the general approach. The Commission said this at para.1.55 of its report:

"1.55 Given the culpability associated with knowingly and voluntarily becoming intoxicated and the associated increase in the known risk of aggressive behaviour, there is a compelling argument for imposing criminal liability to the extent reflected by that culpability. The imposition of such criminal liability is morally justifiable in principle and warranted by the desirability of ensuring public safety and deterring harmful conduct."

Similar policy considerations have led to specific rules in some common law countries where the criminal law has been codified, excluding reliance on voluntary intoxication either generally or subject to limited exceptions. See, for example, s.33 of the Canadian Criminal Code, Division 8 of the Australian Commonwealth Criminal Code and s.28 of the Western Australian Criminal Code (largely duplicated in the Queensland Code).

As we have said, the concept of diminished responsibility originated in Scots law, and was imported into English law only in the Homicide Act 1957 . In Scots law it had been known since the early part of the twentieth century. It was judge-made law rather than of statutory origin. The essence of the plea in Scots law is some form of mental abnormality which substantially impaired the accused's ability to determine or control his actions. That is substantially reflected in the modern English statutory definition. But a condition brought about by the voluntary consumption of drink or drugs was an exception

and could not be relied upon. The court so held in *Brennan v HM Advocate* 1977 J.C. 38, as well as holding for the same reason that the same exception applied to insanity. It cited *Hume* (Commentaries on the Law of Scotland respecting Crimes, Vol.1, p.45): ***464**

> "… certain it is that the law of Scotland views this wilful distemper with a quite different eye from the other which is the visitation of Providence; and if it does not consider the man's intemperance as an aggravation, at least sees very good reasons why it should not be allowed as an excuse to save him from the ordinary pains of his transgression … .
>
> … what protection could we have, if this were the law, against the attempts of such who might inflame themselves with liquor on purpose to gain courage to indulge their malice, and an opportunity to do it safely ? Besides, if there were no risk of such contrivances, it is indispensable to guard the safety of the peaceable and decent part of the community who would otherwise be at the discretion of the dissolute and worthless."

The court concluded that:

> "… the defence of diminished responsibility cannot, any more than the special defence of insanity, be established on mere proof of the transitory effects upon the mind of self-induced intoxication."

Subsequently the Scottish Law Commission reviewed the position in a report published in July 2004 (*Report on Insanity and Diminished Responsibility* , Scot. Law Com. No.195). It endorsed the exception for voluntary intoxication. Its recommendations were given statutory effect in the Criminal Justice and Licensing (Scotland) Act 2010 of the Scottish Parliament. The common law rule that voluntary intoxication cannot found the plea of diminished responsibility is accordingly now established by statute in Scotland.

It follows that the amendments to s.2 of the Homicide Act 1957 were made against the background of a clear general approach to voluntary intoxication which was also consistent with the approach adopted in other relevant jurisdictions.

Amending section 2 of the Homicide Act 1957

The initial source of the amendments to s.2 lay in a request made in June 2003 by the Home Secretary of the Law Commission to undertake a general review of the partial defences to murder. The result was the Law Commission's report, *Reforming Provocation: Perspectives from the Law Commission and the Government* , Law Com No.290, in August 2004. The Commission concluded that the partial defences (provocation and diminished responsibility) ought best to be considered in the context of a wholesale review of the law of homicide generally. It did however make recommendations for changes to the law of provocation, whilst suggesting that any legislation await such general homicide review. So far as diminished responsibility was concerned, it concluded that the existing law was causing no difficulty and stood in no immediate need of amendment. It specifically advised in para.5.85 that the law relating to voluntary intoxication was "clear and satisfactory" as explained in Dietschmann ([11] above), and that the only difficulty lay in those cases where there was difficulty in discerning when there was and when there was not alcoholism. This was described as a marginal difficulty capable of resolution by judicial decision (as indeed subsequently occurred in Wood (Clive) and Stewart). Whilst thus recommending no present change, the Commission did put forward for discussion a possible re-formulation of s.2 on diminished responsibility. That formulation would have provided that the partial defence arose where there was: (1) substantial impairment of one of the three functions now listed ***465** in the new subs.(1A) ([7] above); and which (2) arose from "an underlying condition" amounting to a pre-existing mental or physiological condition other than of a transitory kind. None of that could possibly have affected the existing law on voluntary intoxication, which, as we have said, the Commission described as "clear and satisfactory".

The next step was the Commission's review of homicide generally: *Murder, Manslaughter and Infanticide* , Law Com No.304 (November 2006). The Commission favoured a wholesale reform of homicide involving the creation of two degrees of murder in addition to manslaughter. Under such a proposal, the role of the partial defences would have been to apply only to first degree murder and to reduce it to second degree murder. As is well known, that radical reform did not commend itself to Parliament.

The report contains no further discussion at all of the law relating to voluntary intoxication. We infer that that was because nothing had changed since 2004 when the existing law had been so clearly commended; there had so far as we are aware been no significant discussion about it in any public quarter. The Commission did slightly amend its formulation of diminished responsibility into what was substantially the form adopted by the Coroners and Justice Act 2009 . (There was a suggested addition of developmental immaturity which was not adopted by Parliament but that is irrelevant to the present issue.) For present purposes the significant change in formulation was to move from "an abnormality of mental functioning arising from an underlying condition " (2004) to "an abnormality of mental functioning arising from a recognised medical condition " (2006) (our emphasis).

The Commission explained the reasons for this slightly altered formulation in paras 5.114–5.120. They were:

- i) the law ought no longer to be constrained by a fixed set of causes of mental malfunction but should be responsive to developments in medicine and psychiatry; and
- ii) the altered formulation would help to make clearer the relationship between the role of the medical expert and the role of the jury.

As to the first of those, the Commission quoted at length from, and endorsed, evidence given to it by the Royal College of Psychiatrists. The College was concerned to establish that the partial defence should be grounded in valid medical diagnosis, rather than in imaginative or idiosyncratic fringe opinion. In that context the College had said this, at 5.114:

> "It would also encourage reference within expert evidence to diagnosis in terms of one or two of the accepted internationally classificatory systems of mental conditions (WHO ICD-10 and AMA DSM) without explicitly writing those systems into the legislation … Such an approach would also avoid individual doctors offering idiosyncratic 'diagnoses' … ."

It is apparent from this, and from the total silence in the 2006 report on the subject of voluntary intoxication, that the altered formulation owed nothing whatever to any intention in any quarter to alter the law on that topic. ***466**

ICD-10 and DSM-IV

The World Health Organisation (WHO) has for many years sponsored the publication of an International Statistical Classification of Diseases and Related Health Problems (ICD) of which the current edition is ICD-10. As its full title suggests, it is a general classification of the whole range of medical conditions and health problems; it is in no sense limited to diseases or conditions of the mind. The introduction to the current edition explains that it is the latest in a series which has its origins in work in the 1850s. The first edition, known as the International List of Causes of Death, was adopted by the International Statistical Institute in 1893. WHO adopted in 1967 the WHO Nomenclature Regulations which stipulate the use of ICD for mortality and morbidity statistics by all Member States. It is now described, in the introduction, as "the international standard diagnostic classification for all general epidemiological, many health management purposes and clinical use" [sic]. In other words, it is primarily a diagnostic tool for doctors and a statistical tool for public health professionals.

The American Medical Association has for many years sponsored a similar classification under the title "Diagnostic and Statistical Manual" (DSM). That part of it which relates to conditions of the mind is now known as DSM-IV, published under

the auspices of the American Psychiatric Association. It is a very substantial volume. Like ICD-10, and as its title makes clear, it is a tool for clinical diagnosis and for statistical analysis. Its introduction begins with a statement of its priority aim "to provide a helpful guide to clinical practice", and refers also to the goal of improving communications between clinicians and researchers and to its usefulness in the collection of clinical information. Its introductory pages contain also a specific caution about forensic use:

> "When DSM-IV categories, criteria and textual descriptions are employed for forensic purposes there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder', 'mental disability', 'mental disease' or 'mental defect'."

The particular "imperfect fit" there under consideration is the divergence between the *level* of impairment which may bring a patient within a DSM-IV classification and the level necessary to have legal impact. But exactly the same considerations apply when the question is whether the doctors' classification system addresses the legal issue in any particular case. There will inevitably be considerations of legal policy which are irrelevant to the business of medical description, classification, and statistical analysis.

The "imperfect fit" to which the authors of DSM-IV refer is nowhere more clearly demonstrated than in the breadth and kind of conditions which are included in both ICD-10 and DSM-IV. ICD-10 includes, for example, "unhappiness" (R45.2), "irritability and anger", (R45.4) "suspiciousness and marked evasiveness" (R46.5), "pyromania" (F63.1), "paedophilia" (F65.4), "sado-masochism" (F65.5) and "kleptomania" (F63.2). DSM-IV includes similar conditions and also such as "exhibitionism" (569), "sexual sadism" (573) and "intermittent explosive disorder" ***467** (663/667). The last of these is defined as "discrete episodes of failure to resist aggressive impulses that result in serious assaultive acts or destruction of property, where the degree of aggression is grossly out of proportion to any precipitating psychosocial stressors". Not all of these are treated by the classification systems as mental disorders, but all are, doubtless, "recognised medical conditions" in the sense that they are perfectly sensibly included in guides for description of patients by doctors. It follows that a great many conditions thus included for medical purposes raise important additional legal questions when one is seeking to invoke them in a forensic context. "Intermittent explosive disorder", for example, may well be a medically useful description of something which underlies the vast majority of violent offending, but any suggestion that it could give rise to a defence, whether because it amounted to an impairment of mental functioning or otherwise, would, to say the least, demand extremely careful attention. In other words, the medical classification begs the question whether the condition is simply a description of (often criminal) behaviour, or is capable of forming a defence to an allegation of such.

The Supreme Court of Canada addressed a similar point in *R. v. Bouchard-Lebrun* 2011 SCC 58; [2011] 3 S.C.R. 575, in ruling that a defendant who was severely intoxicated by voluntarily taken drugs could not rely on the defence of insanity under the Criminal Code. Giving the judgment of the court, Lebel J. observed at [61]–[62] that:

> "For the purposes of the Criminal Code, 'disease of the mind' is a legal concept with a medical dimension … the trial judge is not bound by the medical evidence, since medical experts generally take no account of the policy component of the analysis required by s. 16 [of the Criminal Code]."

The appellant's argument

The appellant's case was put with disarming simplicity by Miss O'Neill QC and runs as follows:

• i) the Act commands attention to whether there is an abnormality of mental functioning attributable to a "recognised medical condition";
• ii) ICD-10 contains, at F10.0, the condition of "Acute Intoxication"; it is distinguished from "harmful use" (F10.1) and "dependence syndrome" (F10.2); it is defined simply as "a condition that follows the administration of a psychoactive substance resulting in disturbances in level of consciousness, cognition, perception, affect or behaviour, or other physiological functions or responses"; (we note that DSM-IV lists a similar condition of "alcohol intoxication");
• iii) that is therefore a "recognised medical condition";
• iv) that is the condition in which the defendant was when he killed his partner, whether or not he was so drunk that he could not form an intent and whether or not he is telling the truth when he asserts loss of memory;
• v) intoxication involves an impairment of mental functioning and it might well, depending on the facts, affect one or more of the three functions listed in subs.(1A);
• vi) therefore diminished responsibility ought to have been left to the jury. ***468**

Conclusions

We are here concerned only with intoxication which is: (a) voluntary; and (b) uncomplicated by any alcoholism or dependence. Whilst we are concerned with alcohol, our conclusions must be the same in relation to the effects of the voluntary ingestion of other drugs or substances.

The deceptively simple argument for the appellant by-passes the very clear general law against the background of which this new amendment to s.2 of the Homicide Act 1957 was enacted. For the reasons which we have explained, the exception which prevents a defendant from relying on his voluntary intoxication, save upon the limited question of whether a "specific intent" has been formed, is well entrenched and formed the unspoken backdrop for the new statutory formula. There had been no hint of any dissatisfaction with that rule of law. If Parliament had meant to alter it, or to depart from it, it would undoubtedly have made its intention explicit. Such an intention cannot be inferred from the adoption in the new formulation of the expression "recognised medical condition" because the origins of that were clearly explained by the Law Commission. They explicitly did *not* include writing the terms of ICD-10 and/or DSM-IV into the legislation, for which purpose those terms are demonstrably unsuited. See [27]–[28] and [30] above.

Having sought the assistance of counsel on the topic, we have also given consideration to whether Miss O'Neill's reading of the statute is required by the canon of statutory construction usually labelled the principle against doubtful criminality or doubtful penalisation. This is generally stated to mean that, in the words of Lord Reid in Sweet v Parsley (1969) 53 Cr. App. R. 221, 225; [1970] A.C. 132, 149 :

> "it is a universal principle that if a penal provision is reasonably capable of two interpretations that which is most favourable to the accused must be adopted."

The rationale of that principle has often been stated. It is justified by the requirement to give fair warning to citizens of which conduct may attract punishment. Individuals ought not to be left to guess at what they can or cannot do without infringing the criminal law and subjecting themselves to punishment: see for example Sweet v Parsley , per Lord Diplock at 246 and 163, where he referred to it being contrary to principle to assume that Parliament intended to penalise one who has performed his duty as a citizen to ascertain what acts are prohibited by law and has taken all proper care to inform himself of any facts which would make his conduct unlawful. The same basis for decision was relied upon in the context of art.7 of the European Convention on Human Rights in Kokkinakis v Greece (1994) 17 E.H.R.R. 397 .

Miss O'Neill conceded that strict construction of a criminal statute may give way to other principles of interpretation, especially to the clear mischief which the Act was designed to remedy, and indeed is a canon of "last resort". That expression

derives from a single remark of Lord Steyn in R. (Junttan Oy) v Bristol Magistrates' Court [2003] UKHL 55; [2003] I.C.R. 1475 at [84], citing *Cross on Statutory Interpretation* , although in that case there were many other grounds for the decision. There are many examples in the books of the mischief rule of construction prevailing, of which R. v JTB [2009] UKHL 20; [2009] 2 Cr. App. R. 13 (p.189); [2009] 1 A.C. 1310 is a striking example. There it was said to be impossible from ***469** the words of the statute alone to determine whether s.34 of the Crime and Disorder Act 1998 removed the whole concept of doli incapax from children between the ages of 10 and 14 or removed only the rebuttable presumption of it. However, consideration of the mischief and of the pre-legislative consultation and Parliamentary history led to the conclusion that the whole concept was removed. That conclusion was of course the less favourable to defendants of the rival constructions but promoted the power of the court to deal with serious crime committed by the very young.

There is no occasion in this case for a definitive analysis of the circumstances in which the principle of strict construction of penal statutes, which is alive and well even if it may often give way to other canons of construction, will or will not be applied. It is quite clear that there is no occasion for it to be applied in the present case. There is simply no occasion which can be envisaged in which any citizen might order his affairs on the basis of a misunderstanding of the extent of the partial defence of diminished responsibility. The act of killing, with intent either to kill or to do grievous bodily harm and without justification (for example that of self defence), must have taken place before there can be any question of the partial defence arising. That act is a most serious criminal offence, and there is no risk of its legal character being misunderstood. The partial defence provides no more than a mitigation, judged ex post facto by the court with the assistance of expert evidence.

In the present case, Judge Wait relied in refusing to leave diminished responsibility to the jury on the additional factor that the condition of the defendant was a transitory or temporary one. That, he was disposed to hold, was not capable of amounting to a "recognised medical condition" for the purposes of the new s.2 of the Homicide Act 1957 . We prefer not to rest our conclusion on this consideration, although it is clearly a relevant factor. We do not think that we should rule out the possibility that there may be genuine mental conditions, in no sense the fault of the defendant and well recognised by doctors, which although temporary may indeed be within the ambit of the Act. Whether concussion, for example, is such a condition is a question which does not arise for decision in this case.

Nor do we attempt to resolve the many questions which may arise as to other conditions listed in either ICD-10 or DSM-IV. It is enough to say that it is quite clear that the re-formulation of the statutory conditions for diminished responsibility was not intended to reverse the well established rule that voluntary acute intoxication is not capable of being relied upon to found diminished responsibility. That remains the law. The presence of a "recognised medical condition" is a necessary, but not always a sufficient, condition to raise the issue of diminished responsibility.

If we had concluded that the defence of diminished responsibility ought to have been left to the jury, we should have been unable to accept the Crown's invitation to hold that it could not have succeeded in any event because of what must have been the findings of the jury. We agree that the jury must have rejected the defendant's assertion that he had been so drunk as to be unable to form the intention to kill or to do serious bodily harm. We agree that his use of the telephone in the immediate aftermath of the killing tends quite strongly to suggest that he was in much better control of himself than was suggested. We agree that there were good grounds on which it may well be that the jury rejected also his assertion that he had no recollection of events. We agree that the jury rejected the argument that he had lost self-control in circumstances in which a reasonable man might have done ***470** as he did. But if it had been the law that voluntary acute intoxication could found diminished responsibility, the level of drunkenness involved would not necessarily have to reach inability to form an intent, nor would the loss of self-control necessarily have to be such as might have led a reasonable man to do as the defendant did. On our very clear conclusions, however, these considerations do not arise. Voluntary acute intoxication, whether from alcohol or other substance, is not capable of founding diminished responsibility.

It follows that this appeal must be dismissed.

Appeal against conviction dismissed. ***471**

Footnotes

1 Homicide Act 1957 s.2 (as amended): see post, [3].

[2012] 1 Cr. App. R. 34

A–3. *Oraki v. Crown Pros. Serv.*, [2018] EWHC (Admin) 115, [2018] 1 Cr. App. R. 27 (Eng.)

***402 Oraki v. Director of Public Prosecutions**

Image 1 within document in PDF format.

Queen's Bench Divisional Court
17 January 2018

[2018] EWHC 115 (Admin)

[2018] 1 Cr. App. R. 27

Lord Justice Singh and Sir David Calvert-Smith :

17 January 2018

Analysis

Obstructing police; Police officers; Self-defence;

H1 Self defence—Extent of defence—Obstruction of police officer—Police officer lawfully using slight force against defendant's mother in prevention of offence—Defendant alarmed by mother's screams pulling officer away—Defendant charged with obstructing police officer in execution of duty—Whether defence of self-defence in principle available to defendant—Police Act 1996 (c.16) s.89(2)

The defendant driver, who was travelling with his mother, was pulled over by two police officers, who suspected that he was driving without insurance. The defendant and his mother got out of the car while the insurance position was investigated. When the officers communicated their decision to detain the car, the defendant's mother got into the driving seat and inserted the keys into the ignition. One of the officers put his hand on her arm with a view to restraining her from starting the engine and driving off, whereupon she started to scream. The defendant, alarmed at what was happening to his mother, pulled the officer away. He was convicted in the magistrates' court of obstructing a police officer in the execution of his duty, contrary to s.89(2) of the Police Act 1996 . On the defendant's appeal, the Crown Court held that the defence of self-defence was not available to a defendant charged under s.89(2) of the Act. Had it been, the court held that it would have allowed the defendant's appeal against conviction. The defendant appealed by way of case stated.

Held, allowing the appeal, that self-defence, which was a general defence not restricted to offences involving use of force, was in principle available in relation to the offence of obstructing a police officer in the execution of his duty. In effect, the Crown Court had found that the defendant's state of mind was that his mother was being assaulted by the police officer, and he intervened in order to prevent that taking place. If what he had believed was true, the defence would have been available to him. Accordingly, the conviction would be quashed (post, [26], [41]–[43]).

Kenlin v Gardiner [1967] 2 Q.B. 510; [1967] 2 W.L.R. 129 DC considered .

(For offences against police officers, see *Archbold* 2018, para.19-325 and following.)

H6 Additional cases referred to in the judgment of Singh LJ:

- Albert v Lavin (1982) 74 Cr. App. R. 150; [1982] A.C. 546; [1981] 3 W.L.R. 955 HL ***403**
- Ansell v Swift [1987] Crim L.R. 194 Lewes Crown Court
- Cresswell v Director of Public Prosecutions [2006] EWHC 3379 (Admin); (2007) 171 J.P. 233 DC
- Director of Public Prosecutions v Bayer [2003] EWHC 2567 (Admin); [2004] 1 Cr. App. R. 38 (p.493); [2004] 1 W.L.R. 2856 DC
- R. v Browne [1973] N.I.L.R. 96 CCA(NI)
- R. v Fennell (Owen) (1970) 54 Cr. App. R. 451; [1971] 1 Q.B. 428; [1970] 3 W.L.R. 513 CA
- R. v McKoy [2002] EWCA Crim 1628
- R. v Williams (Gladstone) (1984) 78 Cr. App. R. 276; [1984] Crim L.R. 163 CA

Appeal by case stated

On 21 July 2016 at Hammersmith Magistrates' Court the defendant, Ramtin Oraki, was convicted of obstructing a police officer in the execution of his duty, contrary to s.89(2) of the Police Act 1996 . He appealed against conviction. On 4 August 2017 in the Crown Court at Isleworth his appeal was dismissed by Recorder Hill-Smith sitting with two lay justices. He appealed by way of case stated. The question for the opinion of the High Court was: "Is self-defence or defence of another a defence available to a charge of obstructing a police officer under s.89(2) of the 1996 Act?"

The facts and grounds of appeal appear in the judgment of Singh LJ.

H9 Representation

- Claire Mawer (instructed by McMillan Williams) for the defendant.
- Michael Bisgrove (instructed by the Crown Prosecution Service) for the Crown.

Singh LJ:

Introduction

This is an appeal by way of case stated from the Crown Court at Isleworth, which on 4 August 2017 dismissed, so far as relevant, the defendant's appeal against his conviction for obstruction of a police officer in the execution of his duty, contrary to s.89(2) of the Police Act 1996 (the 1996 Act) at Hammersmith Magistrates' Court on 21 July 2016.

The question which has been stated for the opinion of this court is: "Is self-defence or defence of another a defence available to a charge of obstructing a police officer under s.89(2) of the 1996 Act ?"

I will refer to the defence as "self-defence" or simply as "the defence" although it should be understood that I include in that concept the defence of another person.

Factual background

The factual background can be gleaned from the findings made by the Crown Court at paras 9–25 of the case stated. The alleged offence occurred on 11 September 2014. The defendant was driving a Mercedes car. His mother, Dr Oraki, was in the passenger seat. The defendant did not have valid insurance to drive at the material time.

PC Harding and PC Nash were genuine police officers. The defendant did not believe otherwise, and even if he had believed otherwise, his belief would not have ***404** been reasonable. The two police officers were wearing uniforms. The defendant was requested to pull over by the police officers, and he did so. The defendant and his mother subsequently got out of the car. The insurance position was investigated and the officers reasonably suspected that the defendant was driving without insurance, as indeed was the case.

The officers were entitled to, and did, detain the Mercedes car, pursuant to their powers under s.165A of the Road Traffic Act 1988 . This detention was communicated to Dr Oraki and the defendant, who reacted angrily and emotionally. Dr Oraki leant over and took the keys out of the ignition. Although this was denied by her, the court preferred the evidence of PC Harding on his point. Following the communication of the decision to detain the car, Dr Oraki returned to the car and got into the driver's seat. She was seen by PC Nash inserting the keys into the ignition, and putting her hand on the keys with a view to driving off. Dr Oraki denied this but the court preferred the evidence of PC Nash on this point. PC Nash then put his hand on the arm of Dr Oraki with a view to restraining her from starting the engine and driving off. The court found the actions of PC Nash were reasonable and proportionate, and that he was acting in the course of the execution of his duty in so acting in seeking to prevent removal of the car following its detention. The actions of PC Nash in putting his hand on her arm caused Dr Oraki to scream loudly and vociferously. The defendant, who was nearby, came over to pull PC Nash away because he was alarmed at what was happening to his mother.

PC Harding then intervened. The defendant alleged that he had acted in self-defence in trying to pull PC Nash away, as he said he was concerned for the safety of his mother. The court found that the defendant's conduct "was not unreasonable" given that it is clear that Dr Oraki was screaming at the time and the defendant was reacting to those screams. However, the court held that a defence of self-defence was not available to the defendant to the offence charged under s.89(2) of the 1996 Act in the light of what was said by the Court of Appeal (in fact that should have been a reference to the Divisional Court) in Kenlin v Gardiner [1967] 2 Q.B. 510 at 518 (see para.27 of the case stated).

The court further held that if, contrary to the above, the defence had been available as a matter of law, it would have allowed the appeal from the conviction of obstructing PC Nash in the course of the execution of his duty (see para.28).

In the magistrates' court, the defendant was convicted of four offences: (1) obstructing a police officer, namely PC Nash in the execution of his duty; (2) assaulting a police officer, PC Harding, in the course of the execution of his duty, contrary to s.89(1) of the 1996 Act ; (3) obstructing a police officer, PC Harding, in the course of the execution of his duty; and (4) driving without insurance.

The defendant did not pursue his appeal from the conviction of that last matter, the offence of driving without insurance, but he did appeal to the Crown Court in respect of the other three matters. The appeal was heard by the Crown Court which comprised Recorder Hill-Smith sitting with two lay justices. The Crown Court allowed the appeal in relation to matters (2) and (3) above. However, it dismissed the appeal in relation to matter (1) above. The court gave its reasons orally at the end of the hearing and subsequently put them in writing when it was asked to state a case for the opinion of this court.

There has been some suggestion in the background to this case, which was mentioned again towards the end of the hearing before this court, that the defendant was never in fact convicted by the magistrates' court of the offence of obstructing ***405** PC Nash in the execution of his duty, and that the Crown Court never had that matter properly before it. We cannot concern ourselves with such suggestions. We have a case stated before this court, and we must deal with it and only with that case stated. Whether other procedures might have been available to the defendant or may still be available is a matter for him and his legal advisers.

Grounds of appeal

On behalf of the defendant, it is submitted by Ms Claire Mawer that the Crown Court erred in law in holding that self-defence and defence of another person are not available to a charge of obstruction of a police officer in the execution of this duty. It is submitted that as the Crown Court itself made clear, if that defence were available as a matter of law, the appeal from the magistrates' court would have been allowed, and accordingly his conviction should be quashed.

Material legislation

Section 89 of the 1996 Act , so far as material, provides:

"(1) Any person who assaults a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.
(2) Any person who resists or wilfully obstructs a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding level 3 on the standard scale, or to both … ."

The predecessor provisions were contained in s.51 of the Police Act 1964 (the 1964 Act). That section was the subject of consideration by the Divisional Court in Kenlin v Gardiner , to which I will turn later.

So far as relevant, the following provisions are to be found in s.76 of the Criminal Justice and Immigration Act 2008 :

"(1) This section applies where in proceedings for an offence—
(a) an issue arises as to whether a person charged with the offence ('D') is entitled to rely on a defence within subsection (2), and
(b) the question arises whether the degree of force used by D against a person ('V') was reasonable in the circumstances.
(2) The defences are—
(a) the common law defence of self-defence …
(b) the defences provided by section 3(1) of the Criminal Law Act 1967 … (use of force in prevention of crime or making arrest).
(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.
(4) If D claims to have held a particular belief as regards the existence of any circumstances— ***406**
(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—
(i) it was mistaken, or
(ii) (if it was mistaken) the mistake was a reasonable one to have made …
(10) In this section …
(b) references to self-defence include acting in defence of another person; … ."

Kenlin v Gardiner

In Kenlin v Gardiner [1967] 2 Q.B. 510 the Divisional Court comprised Lord Parker CJ, Winn LJ and Widgery J. The main judgment was given by Winn LJ. The facts concerned two schoolboys aged 14 who were in fact innocently visiting a number of premises for the purpose of reminding certain members of their school rugby team of a forthcoming match. They aroused the suspicions of two police officers who were on duty but were in plain clothes. One of the officers produced his warrant card and said: "We are police officers. Here is my warrant card. What are you calling at houses for?" But the boys did not read nor comprehend the nature of the warrant card, and they did not believe them to be genuine police officers. One boy made as if to run away, and one of the police constables caught hold of his arm and said: "Now look son, we are police officers. What have you been up to?" and cautioned him. The boy started to struggle violently, punching and kicking the officer. The other officer came to his assistance and the boy asked for his warrant card. That was not produced owing to the struggle.

Each boy was charged with assaulting a police constable in the execution of his duty, contrary to s.51(1) of the 1964 Act . The boys were convicted by the magistrates' court. On appeal by way of case stated, this court allowed the appeal and quashed the convictions. This was on the ground that since there had been a technical assault by the police officer who took hold of the arm one of the boys, the defence of self-defence was available to them.

At 518 Win LJ said:

> "Of course, in the case of a charge of assault under section 51(1) of the Police Act, 1964 , as in the case of any charge of assault, the defence or justification—I prefer to call it a justification, because it must always be borne in mind that it is for the prosecution to exclude justification and not for the defendant to establish it—the justification of self-defence is available just as it is in the case of any other assault. That is subject to this, that if the self-defence, in this case self-defence by the two boys against a prior assault such as had been committed, in a technical sense, by the police officers taking hold of an arm of each of these boys, was self-defence against an assault which was justified in law, as, for instance, a lawful arrest, then in law self-defence cannot afford justification for assault in resistance to justified assault by police officers."

The reason why in the circumstances of that case the touching of the boys' arms was unlawful was that the police officers had not done anything purporting to make ***407** an arrest of either of the boys, even if there had been grounds for arresting them. As Winn LJ put it at 519:

> "What was done was not done as an integral step in the process of arresting, but was done in order to secure an opportunity, by detaining the boys' escape, to put to them or to either of them the question which was regarded as the test question to satisfy the officers whether or not it would be right in the circumstances, and having regard to the answer obtained from that question, if any, to arrest them."

For that reason, the police officer had committed what Winn LJ called "a technical assault" on the boys.

It will be noted that the decision of this court in Kenlin v Gardiner concerned only the offence of assaulting a constable in the execution of his duty, in other words the offence under subs.(1) of s.51 of the 1964 Act corresponding to the offence which now exists under s.89(1) of the 1996 Act . Importantly, this court did not say anything about the offence of obstructing a police officer under subs.(2).

The parties' submissions

On behalf of the defendant, Ms Claire Mawer submits that the Crown Court erred in law in holding that the defence was not available to a charge under s.89(2) of the 1996 Act . She submits that the court erred in regarding the issue as having

been determined by the decision of this court in Kenlin v Gardiner . She reminds this Court that that case in fact did not concern the offence of obstruction, but rather the offence of assault. She also submits that it would be contrary to principle and would make no sense if the defence is available to the charge of assault (which is common ground) but not available to the charge of obstruction. The very same incident (as the present case perhaps illustrates) may involve actions which could be charged as either or both.

On behalf of the Crown, Mr Michael Bisgrove, as I understand his submissions, has not sought to uphold the reasoning of the Crown Court as such. In particular, he has not sought to maintain the distinction apparently drawn by the Crown Court between offences of assault, including assaulting a constable in the execution of his duty, and the offence of obstruction of a constable in the execution of his duty. Mr Bisgrove submits that while it is accepted that the decision in Kenlin v Gardiner is not the key authority in this context, nevertheless the proposition of law that self-defence was not available, where the actions of the defendant were to resist the lawful action of a police officer, is correct. Mr Bisgrove submits that the true principle is that a defendant cannot rely on self-defence where the use of force by the complainant is lawful, whether or not the defendant believes it to be lawful.

He accepts that the proposition formulated so broadly has to be read subject to glosses. The first is where an act may not be unlawful in the strict sense (because, for example, it was done by a child who is below the age of criminal responsibility) but is unjustified. That is not material in the present case. The second is a more important gloss relating to mistakes of fact. Mr Bisgrove submits that while a mistaken belief as to the facts may lay the foundation for the defence, a mistake as to the law cannot do so. The crucial question, he submits, is whether what the constables in this case were doing was lawful or not. Since there was no finding ***408** by the Crown Court that it was unlawful, the defendant could not invoke the defence in any event.

Mr Bisgrove accepts, as I have said, that his proposition of law is subject to the gloss that if the defendant had a mistaken belief as to the facts which, if true, would have rendered the action of the police unlawful, then he would, in principle, have been entitled to invoke the defence. However, he submits, those were not the facts of this case as found by the Crown Court. He submits that on the facts as found by that court and as set out in the case stated, the defence was not available to this defendant in any event. Accordingly, he invites this court to dismiss the appeal.

Discussion

I start with the ruling of law which the Crown Court made in this case, before I turn to the alternative way in which Mr Bisgrove has sought to uphold the conviction on appeal. In my view, there is no reason in principle or authority why the defence should not be available in relation to the offence of obstructing a constable. It is a general defence known to the criminal law, unlike some defences which are available in relation to specific offences. The ones that come readily to mind are the partial defences of diminished responsibility and loss of control, which are available only in relation to a charge and murder and, if established, will reduce the offence to one of manslaughter.

I should note in this context what is said by one of the leading works in the field of criminal law, Smith and Hogan , 14th edn (2015), p.450. In answer to the question: “To what offence is public or private defence an answer?”, it is said:

> “These defences are most naturally relied on as answers to charges of homicide, assault, false imprisonment, and other offences against the person. It is not clear to what extent public or private defence may be invoked as defences to other crimes.”

It might be said, although I stress this is not the way in which Mr Bisgrove has framed his submissions before this court, that the defence is restricted to cases of the use of force. However, I do not think that is right as a matter of principle. For example, if a person does not touch a police officer but gets in his way, perhaps by blocking a police car by driving his own

car in front of it, which enables a third party to get away, I can see no reason in principle why the defence of protection of another person should not be available. Depending on the facts, the defence may or may not be a good one, and much will depend on the state of mind of the defendant, for example, if he believes that the police are in fact thugs who are chasing an innocent person. There is no authority which supports the view of the law which was taken by the Crown Court in the present case. The decision of this court in Kenlin v Gardiner is certainly not authority for that proposition. That case was not concerned with the offence of obstructing a constable at all. Furthermore, on its facts, the case was one in which the defence was made out because the police in that case were not acting lawfully, and so the convictions of the two boys were quashed.

I turn to the alternative submission made by Mr Bisgrove on behalf of the Crown. He drew our attention to a number of cases to which I will turn as briefly as I may. The first case is the decision of the Court of Criminal Appeal of Northern Ireland ***409** in R. v Browne [1973] N.I.L.R. 96 in which the judgment of the court was delivered by Lord Lowry CJ, in particular, at 107. In subpara.(3) he said:

> "Where a police officer is acting lawfully and using only such force as is reasonable in the circumstances in the prevention of crime or in effecting the lawful arrest of offenders or suspected offenders, self-defence against him is not an available defence."

I will return briefly to Browne later. The second case is the decision of the Divisional Court in Director of Public Prosecutions v Bayer [2003] EWHC 2567 (Admin); [2004] 1 Cr. App. R. 38 (p.493) in which the judgment of the court was delivered by Brooke LJ. In particular, at [21], it was said:

> "It is a principle of the common law that a person may use a proportionate degree of force to defend himself, or others, from attack or the threat of imminent attack, or to defend his property or the property of others in the same circumstances … ."

At [22], it was said:

> "A hundred years later, in the second edition of his *Textbook of Criminal Law* (1983) Professor Glanville Williams said pithily at p.501 that 'protective force' can be used to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention … ."

Mr Bisgrove emphasises the reference there to the use of force being "unlawful".

Thirdly, reference was made to the decision of the Court of Appeal (Criminal Division) in R. v Fennell (Owen) (1970) 54 Cr. App. R. 451 in which the judgment of the court was given by Widgery LJ. In particular, at 453, it was said:

> "… Mr Bain then contended that by a parity of reasoning a father who used force to effect the release of his son from custody was justified in so doing if he honestly believed on reasonable grounds that (contrary to the fact) the arrest was unlawful. We do not accept that submission. The law jealously scrutinises all claims to justify the use of force and will not readily recognise new ones. Where a person honestly and reasonably believes that he or his child is in imminent danger of injury, it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact. On the other hand, if the child is in police custody and not in imminent danger of injury there is no urgency of the kind which requires an immediate decision and a father who forcibly releases the child does so at his peril. If in fact the arrest proves to be lawful, the father's use of force cannot be justified … ."

Fourthly, reference was made to the decision of the Court of Appeal (Criminal Division) in R. v McKoy [2002] EWCA Crim 1628 in which the judgment was given by Kay LJ (see [6]–[7]) where the CACD approved a direction which had been given by the trial judge to the jury in the following terms:

> "… If a person is properly and lawfully arrested, then use of force to free himself is unlawful. But in this case as a matter of law, it is my responsibility to decide matters of law, I direct you that Police Constable Parker had not, in fact, lawfully arrested McKoy at that stage … ." ***410**

That was described by Kay LJ at [7] of his judgment as "a perfectly proper direction". Indeed, it was described as "a model direction of what was needed in the circumstances".

Finally, for present purposes, Mr Bisgrove drew our attention to the decision of the Divisional Court in Cresswell v Director of Public Prosecutions [2006] EWHC 3379 (Admin) in which the judgment of this court was given by Keene LJ, in particular, at [30]–[31]. Mr Bisgrove submits that Kenlin was not the only authority for the principle of law which was set out at 518 in the judgment of Winn LJ although he accepts that that was obiter on the facts of that case. He submits that the other cases on which he relies, in particular, decisions of the Court of Appeal (Criminal Division) in this jurisdiction, are authority for the proposition on which he relies. He also submits that, applying that principle to the facts of the present case, there was no relevant mistake of fact, only, at most, a mistake of law as to whether the defendant believed that the police officers had the lawful right to act as they did.

Before I address those submissions, I should return to the case of Browne and note that it has been the subject of some academic commentary. In Smith and Hogan , which I have already cited, at p.447, after setting out the material passage which I have already quoted, the authors of that work state:

> "… It may be respectfully suggested this proposition is too wide. If D, an innocent person, is attacked by the police who mistakenly believe him to be a gunman and the police attack is such that it would be reasonable if D were the gunman, does the law really deny the right to resist?"

The footnote to that passage makes reference to a number of cases, most of which have been referred to already in this judgment. They also make reference to Albert v Lavin (1982) 74 Cr. App. R. 150; [1982] A.C. 546 , referring to the decision of the Divisional Court, which was reversed by the House of Lords but on another point, which is said to support the view of the text, and also the decision of the Crown Court at Lewis in Ansell v Swift [1987] Crim. L.R. 194 .

The commentary (by Professor Diane Birch) in the *Criminal Law Review* to that ruling in the Crown Court is also of some interest in this context. It states:

> "… If the constable is acting lawfully there is no reason why a person should be deprived of the defence of self-defence if he genuinely believes in the existence of facts which, if true, would make the use of force by him lawful. Thus, if he mistakenly supposes that a person that has just grabbed him from behind is a robber or a thug, he may use the degree of force necessary to repel a robber or a thug, and it matters not that his assailant is in fact a police officer acting in the execution of his duty. This follows from *Gladstone Williams* … It should not matter that the crime of assaulting a police officer is a

> crime of strict liability so far as the status of the victim is concerned…because the offence still requires proof of an assault and the defence of self-defence affords the justification which prevents that element of the crime from being made out … .”

As will be well known, contrary to some of the earlier cases to which I have referred, the law was subsequently clarified in R. v Williams (Gladstone) (1984) 78 Cr. App. R. 276 and is now as set out by Parliament in s.76 of the 2008 Act . In other words, the reasonableness of a mistaken belief on the part of a defendant is ***411** relevant to the question of whether it is a genuinely held belief but if it is a genuinely held belief, it does not matter that the belief is an unreasonable one. The law of self-defence then applies in accordance with the state of mind of the defendant, albeit mistaken and perhaps unreasonable.

Returning to the submissions which have been made in this court by Mr Bisgrove in support of his alternative argument, I am unable to accept that submission. In the end, I come back to where I began, with the case stated itself. The fact is that the Crown Court made certain findings of fact which they said would have led them to acquit the defendant of the relevant offence if as a matter of law the defence had been available. They held that it was not available for reasons which were wrong in law and by reference to a decision of this court which does not hold what they said it held.

In my view, Ms Mawer is correct to submit that what the Crown Court’s findings of fact amounted to was that the defendant’s state of mind was that his mother was being assaulted by the police officers, and he intervened in order to prevent that taking place. If what he believed had been true, the defence would have been available to him. His mistake was not one simply as to law.

Conclusion

For the reasons I have given I would answer the question posed for the opinion of this court in the case stated in the affirmative. The defence of self-defence or defence of another person is, as a matter of law, available in relation to the offence of obstructing a constable in the execution of his duty under s.89(2) of the Police Act 1996 . Since, in the circumstances of the present case the Crown Court was of the view that if that defence had been available as a matter of law it would have succeeded on the facts, I would allow this appeal, and quash the conviction in this case.

Appeal allowed.

Conviction quashed. ***412**

[2018] 1 Cr. App. R. 27

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A–4. *R v. Williams*, [1984] 78 Cr. App. R. 276 (Eng.)

***276 R. v. Gladstone Williams**

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Court of Appeal
28 November 1983

(1984) 78 Cr. App. R. 276

The Lord Chief Justice , Mr. Justice Skinner and Mr.Justice McCowan
November 28, 1983

Analysis

Assault—Mens Rea—Defence of Mistake—Whether Mistaken Belief Must be Reasonable or Merely Honestly Held.

One M. saw a black youth rob a woman in a street. He caught the youth and held him, but the latter broke from M.'s grasp. M. caught the youth again and knocked him to the ground. The appellant, who had only seen the later stages of the incident, was told by M. that he, M., was arresting the youth for mugging a woman. M. said that he was a police officer, which was untrue, so when asked by the appellant for his warrant card, he could not produce one. A struggle followed and the appellant assaulted M. by punching him in the face and was charged with assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861 . His defence was that he honestly believed that the youth was being unlawfully assaulted by M. The jury were directed that, on the assumption that M. was acting lawfully, the appellant's state of mind on the issue of defence of another was to be determined by whether the appellant had an honest belief based on reasonable grounds that reasonable force was ***277** necessary to prevent a crime. The appellant was convicted and appealed on the ground that the judge had misdirected the jury.

that the jury should have been directed that, first, the prosecution had the burden of proving the unlawfulness of the appellant's actions; secondly, if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of the facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellant's belief was material to the question whether the belief was held by him at all. If the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant. Accordingly, the appeal must be allowed and the conviction quashed.

Director of Public Prosecutions v. Morgan (1975) 61 Cr.App.R. 136; [1976] A.C. 182 and Kimber (1983) 77 Cr.App.R. 225; [1983] 1 W.L.R. 1118 applied .

Dictum of Hodgson J. in Albert v. Lavin (1981) 72 Cr.App.R. 178 ; [1982] A.C. 546, disapproved .

[For *mens rea* and defence to assault see, Archbold, (41st ed.), para. 20-128, 129 . It should be stressed that the recorder considered the Divisional Court decision in Albert v. Lavin (1981) 72 Cr.App.R. 178 before the House of Lords decision was given (see (1982) 74 Cr.App.R. 150) confirming it on different grounds.]

Appeal against conviction.

On March 9, 1983, at the Crown Court of Inner London Area (recorder; Richard Du Cann, Q.C.) the appellant was convicted of occasioning actual bodily harm to one Paul Mason and was given a conditional discharge for 12 months, ordered to pay £50 legal aid contribution and £100 compensation to the victim.

The facts appear in the judgment.

He appealed on a point of law that the learned judge erred in directing the jury that the appellant's state of mind on the issue of defence of another was to be determined by whether he had an honest and reasonable belief, *i.e.* based on reasonable grounds that reasonable force was necessary to prevent crime.

Desmond Fennell, Q.C. and *John Perry* (assigned by the Registrar of Criminal Appeals) for the appellant. *William Howard, Q.C.* and *Austen Issard-Davies* for the Crown.

The Lord Chief Justice:

On March 9, 1983, Gladstone Williams appeared in the Inner London Crown Court charged with assault occasioning actual bodily harm. After a trial he was convicted and was given a conditional discharge for 12 months together with certain financial penalties.

He now appeals on a point of law against his conviction.

The facts were somewhat unusual and were as follows. On the day in question the alleged victim, a man called Mason, saw a black youth seizing the handbag belonging to a woman who was shopping. He caught up with the youth and held him, he said with a view to taking him to a nearby police station, but the youth broke free from his grip. Mason caught the youth again and knocked him to the ground, and he then twisted one of the youth's arms behind his back in order to immobilise him and to enable him, Mason, so he said, once again to take the youth to a police station. The youth was struggling and calling for help at this time, and no one disputed that fact. ***278**

Upon the scene then came the appellant who had only seen the latter stages of this incident. According to Mason he told the appellant first of all that he was arresting the youth for mugging the lady and secondly, that he, Mason, was a police officer. That was not true. He was asked for his warrant card, which obviously was not forthcoming, and thereupon something of a struggle ensued between Mason on the one hand and the appellant and others on the other hand. In the course of these events Mason sustained injuries to his face, loosened teeth and bleeding gums.

The appellant put forward the following version of events. He said he was returning from work by bus, when he saw Mason dragging the youth along and striking him again and again. He was so concerned about the matter that he rapidly got off the bus and made his way to the scene and asked Mason what on earth he was doing. In short he said that he punched Mason because he thought if he did so he would save the youth from further beating and what he described as torture.

There was no doubt that none of these *dramatis personae* was known to each other beforehand.

That simple statement of affairs caused a great deal of difficulty for the unfortunate recorder, with whom we have the utmost sympathy, because it raised issues of law which have been the subject of debate for more years than one likes to think and the subject of more learned academic articles than one would care to read in an evening. Submissions were made to him as to the way in which he should direct the jury on the issue of possible mistake on the part of the appellant as to the circumstances in which he, the appellant, used violence upon Mason.

The contention of the Crown was that the prosecution need only prove to the satisfaction of the jury that the defendant was not acting under a mistaken view of the facts. Their contention was that they did not have to go further and (given that there was a mistake) show that the mistake was an unreasonable one. The defendant on the other hand contended that the reasonableness or otherwise of the mistake was immaterial, and once the jury were satisfied that the appellant was labouring under a mistake and that on the mistaken facts as he believed them to be he would not have committed any offence, then the jury were not obliged to consider further the question of reasonableness.

The learned recorder ruled that the prosecution's contentions as to the law were correct and rejected the submissions made by Mr. Perry on behalf of the defendant to the contrary.

Undoubtedly this question of the proper direction to the jury loomed very largely on the horizon so far as the Court was concerned, and understandably the recorder had his attention directed primarily, if not exclusively, to the problem of whether the belief had to be reasonable in order to afford a defence, if one may put it in that way. Consequently certain fundamental matters to which the jury's attention should have been directed were unhappily overlooked. If one turns to the transcript, one finds first of all the recorder giving the usual and perfectly correct direction to the jury as to the burden of proof being upon the prosecution.

He then at a later stage deals with the question of mistake and this is what he says: “If you come to the conclusion that the defendant, or if this applies to both of them Mr. Williams and Mr. Theodore, had a belief—had the honest and genuine belief—and one could use all sorts of adjectives before the word ‘belief’ but I am not sure they add very much—had the true belief and the reasonable belief, that is to say, the belief based on reasonable grounds that Mason was acting unlawfully, then their use of force would be excused provided again that it was in all the circumstances reasonable and directed to preventing crime, namely the assault upon the youth, and ***279** directed to no more than that in the way that I have explained.” That direction he repeats on the following page almost word for word in order to make it clear to the jury.

It is plain to this Court that those directions failed to make it clear to the jury that it is for the prosecution to eliminate the possibility that the appellant was acting under a genuine mistake of fact. The nearest that he ever got to such a direction is to be found at a stage where the jury returned to Court with a question to ask of the learned recorder, and in the course of answering that question the learned recorder says this: “If you think the position is, or the position may be, that the defendant Mr. Williams had such an honest and genuine belief based on reasonable grounds that Mason was acting unlawfully, then you go on to ask

yourselves: was Mr. Williams' use of force to be excused because—again in all the circumstances—it was a reasonable use of force and directed to no more than preventing the commission of crime?" We take the view that the words "or the position may be" does not cure the earlier defect.

If authority is required for the necessity of a careful direction in circumstances such as these, it is to be found in the decision of Abraham (1973) 57 Cr.App.R. 799; [1973] 1 W.L.R. 1270 , and the passage, which there is no necessity for me to read, is to be found at p.803 and p.1273 of the respective reports. More recently a similar indication is to be found in the judgment of Lawton L.J. in Kimber (1973) 77 Cr.App.R. 225; [1983] 1 W.L.R 1118 (to which it will be necessary for the Court to refer at a later stage in the judgment).

The answer is that this was a material misdirection. It was something at the very foundation of the case and that on its own would have been enough to require this Court to allow the appeal and quash the conviction. But the story does not end there. We have been addressed on the question of whether the learned recorder was right in ruling against the submission by Mr. Perry with regard to the reasonableness of the defendant's belief.

Mr. Howard on behalf of the Crown has helpfully conceded before this Court first of all that the passage to which reference has already been made was indeed a material misdirection and that he cannot argue the contrary, and secondly he has made a further helpful concession that the case of Kimber (*supra*) on the question of reasonable belief not only is binding upon this Court, but answers the question contrary to the submissions of the Crown at the court below. Against that background we turn to consider the second point.

One starts off with the meaning of the word "assault." "Assault" in the context of this case, that is to say using the word as a convenient abbreviation for assault and battery, is an act by which the defendant, intentionally or recklessly, applies unlawful force to the complainant. There are circumstances in which force may be applied to another lawfully. Taking a few examples: first, where the victim consents, as in lawful sports, the application of force to another will, generally speaking, not be unlawful. Secondly, where the defendant is acting in self-defence: the exercise of any necessary and reasonable force to protect himself from unlawful violence is not unlawful. Thirdly, by virtue of section 3 of the Criminal Law Act 1967 , a person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of an offender or suspected offender or persons unlawfully at large. In each of those cases the defendant will be guilty if the jury are sure that first of all he applied force to the person of another, and secondly that he had the necessary mental element to constitute guilt. ***280**

The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more.

What then is the situation if the defendant is labouring under a mistake of fact as to the circumstances? What if he believes, but believes mistakenly, that the victim is consenting, or that it is necessary to defend himself, or that a crime is being committed which he intends to prevent? He must then be judged against the mistaken facts as he believes them to be. If judged against those facts or circumstances the prosecution fail to establish his guilt, then he is entitled to be acquitted.

The next question is, does it make any difference if the mistake of the defendant was one which, viewed objectively by a reasonable onlooker, was an unreasonable mistake? In other words should the jury be directed as follows: "Even if the defendant

may have genuinely believed that what he was doing to the victim was either with the victim's consent or in reasonable self-defence or to prevent the commission of crime, as the case may be, nevertheless if you, the jury, come to the conclusion that the mistaken belief was unreasonable, that is to say that the defendant as a reasonable man should have realised his mistake, then you should convict him."

It is upon this point that the large volume of historical precedent with which Mr. Howard threatened us at an earlier stage is concerned. But in our judgment the answer is provided by the judgment of this Court in Kimber (1983) 77 Cr.App.R. 225; [1983] 1 W.L.R. 1118 , by which, as already stated, we are bound. There is no need for me to rehearse the facts, save to say that that was a case of an alleged indecent assault upon a woman. Lawton L.J. deals first of all with the case of Albert v. Lavin (1981) 72 Cr.App.R. 178 ; [1982] A.C. 546 ; then at p.229 and p.1122 of the respective reports: "The application of the Morgan principle ((1975) 61 Cr.App.R. 136; [1976] A.C. 182) to offences other than indecent assault on a woman will have to be considered when such offences come before the courts. We do, however, think it necessary to consider two of them because of what was said in the judgment. The first is a decision of the Divisional Court in Albert v. Lavin (1981) 72 Cr.App.R. 178 ; [1982] A.C. 546 . The offence charged was assaulting a police officer in the execution of his duty, contrary to section 51 of the Police Act 1964. The defendant in his defence contended, *inter alia* , that he had not believed the police officer to be such and in consequence had resisted arrest. His counsel analysed the offence in the same way as we have done and referred to the reasoning in Director of Public Prosecutions v. Morgan . Hodgson J. delivering the leading judgment, rejected this argument and in doing so said, at p.190 and p.561 of the respective reports: 'In my judgment Mr. Walker's ingenious argument fails at an earlier stage. It does not seem to me that the element of unlawfulness can properly be regarded as part of the definitional elements of the offence. In defining a criminal offence the word "unlawful" is surely tautologous and can add nothing to its essential ingredients … And no matter how strange it may seem that a defendant charged with assault can escape conviction if he shows that he mistakenly but unreasonably thought his victim was consenting but not if he was in the same state of mind as to whether his victim had a right to detain him, that in my judgment is the law.' We have found difficulty in agreeing with this reasoning"—and I interpolate, so have we—"even though the judge seems to be accepting that belief in consent does entitle a defendant to an acquittal on a charge of assault. We cannot accept that the word 'unlawful' when used in a definition of an offence is to be regarded as 'tautologous.' In our judgment the word 'unlawful' does import an essential element into the offence. If it were not there social life would be unbearable, because every touching would amount to a ***281** battery unless there was an evidential basis for a defence. This case was considered by the House of Lords. The appeal was dismissed, but their Lordships declined to deal with the issue of belief."

That is the end of the citation from Kimber (*supra*) in so far as it is necessary for the second point. I read a further passage from p.230 and p.1123 respectively which sets out the proper direction to the jury, and is relevant to the first leg of the appellant's argument in this case. It reads as follows: "In our judgment the learned recorder should have directed the jury that the prosecution had to make them sure that the appellant never had believed that Betty was consenting. As he did not do so, the jury never considered an important aspect of his defence."

We respectfully agree with what Lawton L.J. said there with regard both to the way in which the defence should have been put and also with regard to his remarks as to the nature of the defence. The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words the jury should be directed first of all that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions; secondly, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken view of the facts; thirdly, that is so whether the mistake was, on an objective view, a reasonable mistake or not.

In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected.

Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it.

We have read the recommendations of the Criminal Law Revision Committee, Part IX, paragraph 72(a), in which the following passage appears: “The common law defence of self-defence should be replaced by a statutory defence providing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person.” In the view of this Court that represents the law as expressed in D.P.P v. Morgan (*supra*) and in Kimber (*supra*) and we do not think that the decision of the Divisional Court in Albert v. Lavin (*supra*) from which we have cited can be supported.

For those reasons this appeal must be allowed and the conviction quashed.

Representation

- Solicitors: Solicitor, Metropolitan Police , for the Crown.

Appeal allowed. Conviction quashed. ***282**

(1984) 78 Cr. App. R. 276

APPENDIX B

English Statutes

B–1. Criminal Damage Act, 1971, c. 48, § 5 (U.K.)

UK Statute 1971 c. 48 s. 5

Criminal Damage Act 1971 c. 48

s. 5 "Without lawful excuse."

Analysis (Commencement Information)

This version in force from: **October 14, 1971** to **present**

Image 1 within document in PDF format.

5.— "Without lawful excuse."

(1) This section applies to any offence under section 1(1) above and any offence under section 2 or 3 above other than one involving a threat by the person charged to destroy or damage property in a way which he knows is likely to endanger the life of another or involving an intent by the person charged to use or cause or permit the use of something in his custody or under his control so to destroy or damage property.

(2) A person charged with an offence to which this section applies, shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—

(a) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances; or

(b) if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed—

(i) that the property, right or interest was in immediate need of protection; and

(ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.

(4) For the purposes of subsection (2) above a right or interest in property includes any right or privilege in or over land, whether created by grant, licence or otherwise.

(5) This section shall not be construed as casting doubt on any defence recognised by law as a defence to criminal charges.

Arrangement of Act

UK ST 1971 c. 48 s. 5

End of Document

B–2. Criminal Justice and Immigration Act, 2008, c. 4, § 76 (U.K.)

UK Statute 2008 c. 4 Pt 5 s. 76

Criminal Justice and Immigration Act 2008 c. 4
Part 5 CRIMINAL LAW
Self-defence etc.
s. 76 Reasonable force for purposes of self-defence etc.

Analysis (Commencement Information)

This version in force from: **May 14, 2013** to **present**

The text of this provision varies depending on jurisdiction or other application. See parallel texts relating to: Northern Ireland | England and Wales

Northern Ireland

76 Reasonable force for purposes of self-defence etc.

(1) This section applies where in proceedings for an offence—

(a) an issue arises as to whether a person charged with the offence ("D") is entitled to rely on a defence within subsection (2), and

(b) the question arises whether the degree of force used by D against a person ("V") was reasonable in the circumstances.

(2) The defences are—

(a) the common law defence of self-defence; and

(b) the defences provided by section 3(1) of the Criminal Law Act 1967 (c. 58) or section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (c. 18 (N.I.)) (use of force in prevention of crime or making arrest).

(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

(4) If D claims to have held a particular belief as regards the existence of any circumstances—

(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but

(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—

(i) it was mistaken, or

(ii) (if it was mistaken) the mistake was a reasonable one to have made.

(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

[

(5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

][1]

(6) [In a case other than a householder case, the][2] degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and

(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

(8) Subsection (7) is not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).

[

(8A) For the purposes of this section "a householder case" is a case where—

(a) the defence concerned is the common law defence of selfdefence,

(b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both),

(c) D is not a trespasser at the time the force is used, and

(d) at that time D believed V to be in, or entering, the building or part as a trespasser.

(8B) Where—

(a) a part of a building is a dwelling where D dwells,

(b) another part of the building is a place of work for D or another person who dwells in the first part, and

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is a dwelling.

(8C) Where—

(a) a part of a building is forces accommodation that is living or sleeping accommodation for D,

(b) another part of the building is a place of work for D or another person for whom the first part is living or sleeping accommodation, and

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is forces accommodation.

(8D) Subsections (4) and (5) apply for the purposes of subsection (8A)(d) as they apply for the purposes of subsection (3).

(8E) The fact that a person derives title from a trespasser, or has the permission of a trespasser, does not prevent the person from being a trespasser for the purposes of subsection (8A).

(8F) In subsections (8A) to (8C)—

"building" includes a vehicle or vessel, and

"forces accommodation" means service living accommodation for the purposes of Part 3 of the Armed Forces Act 2006 by virtue of section 96(1)(a) or (b) of that Act.

]3

(9) This section [, except so far as making different provision for householder cases,]4 is intended to clarify the operation of the existing defences mentioned in subsection (2).

(10) In this section—

(a) "legitimate purpose" means—

(i) the purpose of self-defence under the common law, or

(ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);

(b) references to self-defence include acting in defence of another person; and

(c) references to the degree of force used are to the type and amount of force used.

England and Wales

[

76 Reasonable force for purposes of self-defence etc.

(1) This section applies where in proceedings for an offence—

(a) an issue arises as to whether a person charged with the offence ("D") is entitled to rely on a defence within subsection (2), and

(b) the question arises whether the degree of force used by D against a person ("V") was reasonable in the circumstances.

(2) The defences are—

(a) the common law defence of self-defence; [...][6]

[

(aa) the common law defence of defence of property; and

][6]

(b) the defences provided by section 3(1) of the Criminal Law Act 1967 (c. 58) or section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (c. 18 (N.I.)) (use of force in prevention of crime or making arrest).

(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

(4) If D claims to have held a particular belief as regards the existence of any circumstances—

(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but

(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—

(i) it was mistaken, or

(ii) (if it was mistaken) the mistake was a reasonable one to have made.

(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

(5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

(6) In a case other than a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

[

(6A) In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty to retreat.

][7]

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and

(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

(8) [Subsections (6A) and (7) are][8] not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).

(8A) For the purposes of this section "a householder case" is a case where—

(a) the defence concerned is the common law defence of selfdefence,

(b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both),

(c) D is not a trespasser at the time the force is used, and

(d) at that time D believed V to be in, or entering, the building or part as a trespasser.

(8B) Where—

(a) a part of a building is a dwelling where D dwells,

(b) another part of the building is a place of work for D or another person who dwells in the first part, and

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is a dwelling.

(8C) Where—

(a) a part of a building is forces accommodation that is living or sleeping accommodation for D,

(b) another part of the building is a place of work for D or another person for whom the first part is living or sleeping accommodation, and

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is forces accommodation.

(8D) Subsections (4) and (5) apply for the purposes of subsection (8A)(d) as they apply for the purposes of subsection (3).

(8E) The fact that a person derives title from a trespasser, or has the permission of a trespasser, does not prevent the person from being a trespasser for the purposes of subsection (8A).

(8F) In subsections (8A) to (8C)—

"building" includes a vehicle or vessel, and

"forces accommodation" means service living accommodation for the purposes of Part 3 of the Armed Forces Act 2006 by virtue of section 96(1)(a) or (b) of that Act.

(9) This section, except so far as making different provision for householder cases, is intended to clarify the operation of the existing defences mentioned in subsection (2).

(10) In this section—

(a) "legitimate purpose" means—

(i) the purpose of self-defence under the common law,

(ia) the purpose of defence of property under the common law, or

(ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);

(b) references to self-defence include acting in defence of another person; and

(c) references to the degree of force used are to the type and amount of force used.

][5]

Footnotes

1 Added by Crime and Courts Act 2013 c. 22 Pt 2 s.43(2) (April 25, 2013)
2 Words inserted by Crime and Courts Act 2013 c. 22 Pt 2 s.43(3) (April 25, 2013)
3 Added by Crime and Courts Act 2013 c. 22 Pt 2 s.43(4) (April 25, 2013)
4 Words inserted by Crime and Courts Act 2013 c. 22 Pt 2 s.43(5) (April 25, 2013)
5 Added by Legal Aid, Sentencing and Punishment of Offenders Act 2012 c. 10 Pt 3 c.9 s.148(5) (May 14, 2013)
6 Added by Legal Aid, Sentencing and Punishment of Offenders Act 2012 c. 10 Pt 3 c.9 s.148(2) (May 14, 2013)
7 Added by Legal Aid, Sentencing and Punishment of Offenders Act 2012 c. 10 Pt 3 c.9 s.148(3) (May 14, 2013)
8 Words substituted by Legal Aid, Sentencing and Punishment of Offenders Act 2012 c. 10 Pt 3 c.9 s.148(4) (May 14, 2013)

Arrangement of Act

UK ST 2008 c. 4 Pt 5 s. 76

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